

applicant must submit a final monitoring plan to the Assistant Administrator prior to the issuance of an incidental harassment authorization.

(e) At its discretion, the National Marine Fisheries Service may place an observer aboard vessels, platforms, aircraft, etc., to monitor the impact of activities on marine mammals.

(f)(1) As specified in the incidental harassment authorization, the holder of an incidental harassment authorization for Arctic waters must submit reports to the Assistant Administrator within 90 days of completion of any individual components of the activity (if any), within 90 days of completion of the activity, but no later than 120 days prior to expiration of the incidental harassment authorization, whichever is earlier. This report must include the following information:

- (i) Dates and type(s) of activity;
- (ii) Dates and location(s) of any activities related to monitoring the effects on marine mammals; and
- (iii) Results of the monitoring activities, including an estimate of the actual level and type of take, species name and numbers of each species observed, direction of movement of species, and any observed changes or modifications in behavior.

(2) Monitoring reports will be reviewed by the Assistant Administrator and, if determined to be incomplete or inaccurate, will be returned to the holder of the authorization with an explanation of why the report is being returned. If the authorization holder disagrees with the findings of the Assistant Administrator, the holder may request an independent peer review of the report. Failure to submit a complete and accurate report may result in a delay in processing future authorization requests.

(g) Results of any behavioral, feeding, or population studies, that are conducted supplemental to the monitoring program, should be made available to the National Marine Fisheries Service before applying for an incidental harassment authorization for the following year.

#### Subparts J–X [Reserved]

## PART 217—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

### Subpart A [Reserved]

### Subpart B—Taking of Marine Mammals Incidental to Coastal Commercial Fireworks Displays at Monterey Bay National Marine Sanctuary, CA

- 217.11 Specified activity and specified geographical region.
- 217.12 Effective dates.
- 217.13 Permissible methods of taking.
- 217.14 Prohibitions.
- 217.15 Mitigation.
- 217.16 Requirements for monitoring and reporting.
- 217.17 Letters of Authorization.
- 217.18 Renewals and Modifications of Letters of Authorization.

### Subparts C–E [Reserved]

### Subpart F—Taking of Marine Mammals Incidental To Target and Missile Launch Activities From San Nicolas Island, CA

- 217.50 Specified activity and specified geographical region.
- 217.51 Effective dates.
- 217.52 Permissible methods of taking.
- 217.53 Prohibitions.
- 217.54 Mitigation.
- 217.55 Requirements for monitoring and reporting.
- 217.56 Applications for Letters of Authorization.
- 217.57 Letters of Authorization.
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### Subpart G—Taking of Marine Mammals Incidental to U.S. Air Force Launches, Aircraft and Helicopter Operations, and Harbor Activities Related to Launch Vehicles From Vandenberg Air Force Base (VAFB), California

- 217.60 Specified activity and specified geographical region.
- 217.61 Effective dates.
- 217.62 Permissible methods of taking.
- 217.63 Prohibitions.
- 217.64 Mitigation.
- 217.65 Requirements for monitoring and reporting.
- 217.66 Letters of Authorization.

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217.67 Renewals and modifications of Letters of Authorization.

**Subpart H—Taking of Marine Mammals Incidental to Space Vehicle and Missile Launches at Kodiak Launch Complex, Alaska**

217.70 Specified activity and specified geographical region.  
217.71 Effective dates.  
217.72 Permissible methods of taking.  
217.73 Prohibitions.  
217.74 Mitigation.  
217.75 Requirements for monitoring and reporting.  
217.76 Letter of Authorization.  
217.77 Renewal of a Letter of Authorization and adaptive management.  
217.78 Modifications to a Letter of Authorization.

**Subpart I—Taking of Marine Mammals Incidental to Naval Explosive Ordnance Disposal School Training Operations**

217.80 Specified activity and specified geographical region.  
217.81 Effective dates.  
217.82 Permissible methods of taking.  
217.83 Prohibitions.  
217.84 Mitigation.  
217.85 Requirements for monitoring and reporting.  
217.86 Applications for Letters of Authorization.  
217.87 Letters of Authorization.  
217.88 Renewal and review of Letters of Authorization and adaptive management.  
217.89 Modifications of Letters of Authorization.

**Subparts J–K [Reserved]**

**Subpart L—Taking Marine Mammals Incidental to Conducting Precision Strike Weapon and Air-to-Surface Gunnery Missions at Eglin Gulf Test and Training Range (EGTTR) in the Gulf of Mexico**

217.110 Specified activity and specified geographical region.  
217.111 Effective dates.  
217.112 Permissible methods of taking.  
217.113 Prohibitions.  
217.114 Mitigation.  
217.115 Requirements for monitoring and reporting.  
217.116 Applications for Letters of Authorization.  
217.117 Letters of Authorization.  
217.118 Renewals and Modifications of Letters of Authorization.

**Subparts M–N [Reserved]**

**Subpart O—Taking of Marine Mammals Incidental to Operation of Offshore Oil and Gas Facilities in the U.S. Beaufort Sea**

217.140 Specified activity and specified geographical region.  
217.141 Effective dates.  
217.142 Permissible methods of taking.  
217.143 Prohibitions.  
217.144 Mitigation.  
217.145 Measures to ensure availability of species for subsistence uses.  
217.146 Requirements for monitoring and reporting.  
217.147 Applications for Letters of Authorization.  
217.148 Letters of Authorization.  
217.149 Renewal of Letters of Authorization and adaptive management.  
217.150 Modifications of Letters of Authorization.

**Subpart P—Taking Marine Mammals Incidental to Construction and Operation of a Liquefied Natural Gas Deepwater Port in the Gulf of Mexico**

217.151 Specified activity and specified geographical region.  
217.152 Effective dates.  
217.153 Permissible methods of taking.  
217.154 Prohibitions.  
217.155 Mitigation.  
217.156 Requirements for monitoring and reporting.  
217.157 Letters of Authorization.  
217.158 Renewals and Modifications of Letters of Authorization.

**Subpart Q [Reserved]**

**Subpart R—Taking of Marine Mammals Incidental to Operation and Maintenance of the Neptune Liquefied Natural Gas Facility Off Massachusetts**

217.170 Specified activity and specified geographical region.  
217.171 Effective dates.  
217.172 Permissible methods of taking.  
217.173 Prohibitions.  
217.174 Mitigation.  
217.175 Requirements for monitoring and reporting.  
217.176 Applications for Letters of Authorization.  
217.177 Letters of Authorization.  
217.178 Renewal of Letters of Authorization and adaptive management.  
217.179 Modifications of Letters of Authorization.

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### Subparts S–T [Reserved]

#### Subpart U—Taking Of Marine Mammals Incidental To The Port of Anchorage Marine Terminal Redevelopment Project

- 217.200 Specified activities and specified geographical region.
- 217.201 Effective dates.
- 217.202 Permissible methods of taking.
- 217.203 Prohibitions.
- 217.204 Mitigation.
- 217.205 Requirements for monitoring and reporting.
- 217.206 Applications for Letters of Authorization.
- 217.207 Letters of Authorization.
- 217.208 Renewal of Letters of Authorization.
- 217.209 Modifications of Letters of Authorization.

#### Subpart W—Taking and Importing Marine Mammals; Elliott Bay Seawall Project

- 217.220 Specified activity and specified geographical region.
- 217.221 Effective dates and definitions.
- 217.222 Permissible methods of taking.
- 217.223 Prohibitions.
- 217.224 Mitigation.
- 217.225 Requirements for monitoring and reporting.
- 217.226 Letters of Authorization.
- 217.227 Renewals and Modifications of Letters of Authorization.

AUTHORITY: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

SOURCE: 74 FR 35143, July 20, 2009, unless otherwise noted.

### Subpart A [Reserved]

#### Subpart B—Taking of Marine Mammals Incidental to Coastal Commercial Fireworks Displays at Monterey Bay National Marine Sanctuary, CA

SOURCE: 77 FR 31544, May 29, 2012, unless otherwise noted.

EFFECTIVE DATE NOTE: At 77 FR 31544, May 29, 2012, subpart B was added, effective June 28, 2012, through June 28, 2017.

##### § 217.11 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the Monterey Bay National Marine Sanctuary (MBNMS) and those persons it authorizes to display fireworks within the MBNMS for the tak-

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ing of marine mammals that occurs in the area described in paragraph (b) of this section and that occurs incidental to authorization of commercial fireworks displays.

(b) The taking of marine mammals by MBNMS may be authorized in a Letter of Authorization (LOA) only if it occurs in waters of the MBNMS.

##### § 217.12 Effective dates.

Regulations in this subpart are effective from June 28, 2012, through June 28, 2017.

##### § 217.13 Permissible methods of taking.

(a) Under LOAs issued pursuant to §§ 216.106 and 217.17 of this chapter, the Holder of the LOA (hereinafter “MBNMS”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.11(b) of this chapter, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

(b) The incidental take of marine mammals under the activities identified in § 217.11(a) of this chapter is limited to the following species and is limited to Level B Harassment:

(1) Harbor seal (*Phoca vitulina*)—1,150 (an average of 230 annually)

(2) California sea lion (*Zalophus californianus*)—21,095 (an average of 4,219 annually)

##### § 217.14 Prohibitions.

Notwithstanding takings contemplated in § 217.11 of this chapter and authorized by a LOA issued under §§ 216.106 and 217.17 of this chapter, no person in connection with the activities described in § 217.11 of this chapter may:

(a) Take any marine mammal not specified in § 217.13(b) of this chapter;

(b) Take any marine mammal specified in § 217.13(b) of this chapter other than by incidental, unintentional Level B harassment;

(c) Take a marine mammal specified in § 217.13(b) of this chapter if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under §§ 216.106 and 217.17 of this chapter.

#### § 217.15 Mitigation.

(a) The activity identified in § 217.11(a) of this chapter must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitats. When conducting the activities identified in § 217.11(a) of this chapter, the mitigation measures contained in the LOA issued under §§ 216.106 and 217.17 of this chapter must be implemented. These mitigation measures include but are not limited to:

(1) Limiting the location of the authorized fireworks displays to the four specifically designated areas at Half Moon Bay, the Santa Cruz/Soquel area, the northeastern Monterey Breakwater, and Cambria (Santa Rosa Creek);

(2) Limiting the frequency of authorized fireworks displays to no more than twenty total displays per year and no more than one fireworks display every 2 months in each of the four prescribed areas;

(3) Limiting the duration of authorized individual fireworks displays to no longer than 30 minutes each, with the exception of two longer shows not to exceed 1 hour;

(4) Prohibiting fireworks displays at MBNMS between March 1 and June 30 of any year; and

(5) Continuing to implement authorization requirements and general and special restrictions for each event, as determined by MBNMS. Standard requirements include, but are not limited to, the use of a ramp-up period, wherein salutes are not allowed in the first 5 minutes of the display; the removal of plastic and aluminum labels and wrappings; and post-show reporting and cleanup. MBNMS shall continue to assess displays and restrict the number of aerial salute effects on a case-by-case basis, and shall implement general and special restrictions unique to each fireworks event as necessary.

(b) The mitigation measures that the individuals conducting the fireworks

are responsible for will be included as a requirement in fireworks display authorizations issued by MBNMS to the individual entities.

#### § 217.16 Requirements for monitoring and reporting.

(a) MBNMS is responsible for ensuring that all monitoring required under a LOA is conducted appropriately, including, but not limited to:

(1) A census of all pinnipeds in the impact area on the day prior to all displays, with observations to occur for no less than 30 minutes, and

(2) Reporting to NMFS of all marine mammal injury, serious injury, or mortality observed in the vicinity of the display area. Monitoring for injury, serious injury, or mortality shall occur no later than the morning after each fireworks display, and shall occur for no less than 30 minutes.

(b) Unless specified otherwise in the LOA, MBNMS must submit a draft annual monitoring report to the Director, Office of Protected Resources, NMFS, no later than 60 days after the conclusion of each calendar year. This report must contain:

(1) An estimate of the number of marine mammals disturbed by the authorized activities,

(2) Results of the monitoring required in § 217.16(a) of this chapter, and any additional information required by the LOA. A final annual monitoring report must be submitted to NMFS within 30 days after receiving comments from NMFS on the draft report. If no comments are received from NMFS, the draft report will be considered to be the final annual monitoring report.

(c) A draft comprehensive monitoring report on all marine mammal monitoring conducted during the period of these regulations must be submitted to the Director, Office of Protected Resources, NMFS at least 120 days prior to expiration of these regulations. A final comprehensive monitoring report must be submitted to the NMFS within 30 days after receiving comments from NMFS on the draft report. If no comments are received from NMFS, the draft report will be considered to be the final comprehensive monitoring report.

**§ 217.17 Letters of Authorization.**

(a) To incidentally take marine mammals pursuant to these regulations, MBNMS must apply for and obtain a LOA.

(b) A LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, MBNMS must apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, MBNMS must apply for and obtain a modification of the LOA as described in § 217.18 of this chapter.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (i.e., mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of a LOA shall be published in the FEDERAL REGISTER within 30 days of a determination.

**§ 217.18 Renewals and modifications of Letters of Authorization.**

(a) A LOA issued under §§ 216.106 and 217.17 of this chapter for the activity identified in § 217.11(a) of this chapter shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in § 217.18(c)(1) of this chapter), and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA

under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in § 217.18(c)(1) of this chapter) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis illustrating the change, and solicit public comment before issuing the LOA.

(c) A LOA issued under §§ 217.106 and 217.17 of this chapter for the activity identified in § 217.11(a) of this chapter may be modified by NMFS under the following circumstances:

(1) Adaptive Management—NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with MBNMS regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from MBNMS's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) Emergencies—If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.13(b) of this

chapter, an LOA may be modified without prior notice or opportunity for public comment. Notification would be published in the FEDERAL REGISTER within 30 days of the action.

### Subparts C–E [Reserved]

## Subpart F—Taking of Marine Mammals Incidental To Target and Missile Launch Activities From San Nicolas Island, CA

SOURCE: 79 FR 32684, June 3, 2014, unless otherwise noted.

EFFECTIVE DATE NOTE: At 79 FR 32684, June 6, 2014, subpart F was added, effective June 3, 2014, through June 3, 2019.

### § 217.50 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the incidental taking of marine mammals specified in paragraph (b) of this section by the Naval Air Warfare Center Weapons Division, U.S. Navy, and those persons it authorizes to engage in target missile launch activities and associated aircraft and helicopter operations at the Naval Air Warfare Center Weapons Division facilities on San Nicolas Island, California.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited to the following species: Northern elephant seals (*Mirounga angustirostris*), harbor seals (*Phoca vitulina*), and California sea lions (*Zalophus californianus*).

(c) This Authorization is valid only for activities associated with the launching of a total of 40 vehicles (e.g., RAM, Coyote, MSST, Terrier, SM-3, or similar) from Alpha Launch Complex and smaller missiles and targets from Building 807 on San Nicolas Island, California.

### § 217.51 Effective dates.

Regulations in this subpart are effective from June 3, 2014, through June 3, 2019.

### § 217.52 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to § 216.106 and 217.57 of

this chapter, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals by harassment, within the area described in § 217.50, provided the activity is in compliance with all terms, conditions, and requirements of the regulations and the appropriate Letter of Authorization.

(b) The activities identified in § 217.50 must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals is authorized for the species listed in § 217.50(b) and is limited to Level B Harassment.

### § 217.53 Prohibitions.

Notwithstanding takings contemplated in § 217.50 and authorized by a Letter of Authorization issued under §§ 216.106 and 217.57 of this chapter, no person in connection with the activities described in § 217.50 may:

(a) Take any marine mammal not specified in § 217.50(b);

(b) Take any marine mammal specified in § 217.50(b) other than by incidental, unintentional harassment;

(c) Take a marine mammal specified in § 217.50(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under §§ 216.106 and 217.57 of this chapter.

### § 217.54 Mitigation.

(a) When conducting operations identified in § 217.50(c), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 217.57 must be implemented. These mitigation measures include, but are not limited to:

(1) The holder of the Letter of Authorization must not enter pinniped haul-out sites below the missile's predicted flight path for 2 hours prior to planned missile launches.

(2) The holder of the Letter of Authorization must avoid, whenever possible, launch activities during harbor seal pupping season (February to

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April), unless constrained by factors including, but not limited to, human safety, national security, or for vehicle launch trajectory necessary to meet mission objectives.

(3) The holder of the Letter of Authorization must limit, whenever possible, launch activities during other pinniped pupping seasons, unless constrained by factors including, but not limited to, human safety, national security, or for vehicle launch trajectory necessary to meet mission objectives.

(4) The holder of the Letter of Authorization must not launch vehicles from the Alpha Complex at low elevation (less than 1,000 feet (305 m)) on launch azimuths that pass close to pinniped haul-out sites when occupied.

(5) The holder of the Letter of Authorization must avoid, where practicable, launching multiple target missiles in quick succession over haul-out sites, especially when young pups are present.

(6) The holder of the Letter of Authorization must limit launch activities during nighttime hours, except when required by the test objectives.

(7) Aircraft and helicopter flight paths must maintain a minimum altitude of 1,000 feet (305 m) from pinniped haul-outs and rookeries, except in emergencies or for real-time security incidents (e.g., search-and-rescue, fire-fighting), which may require approaching pinniped haul-outs and rookeries closer than 1,000 feet (305 m).

(8) If post-launch surveys determine that an injurious or lethal take of a marine mammal has occurred or there is an indication that the distribution, size, or productivity of the potentially affected pinniped populations has been affected, the launch procedure and the monitoring methods must be reviewed, in cooperation with NMFS, and, if necessary, appropriate changes must be made through modification to a Letter of Authorization, prior to conducting the next launch of the same vehicle under that Letter of Authorization.

(9) Additional mitigation measures as contained in a Letter of Authorization.

(b) [Reserved]

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### §217.55 Requirements for monitoring and reporting.

(a) Unless specified otherwise in the Letter of Authorization, the Holder of the Letter of Authorization must notify the Administrator, West Coast Region, NMFS, by letter or telephone, at least 2 weeks prior to activities possibly involving the taking of marine mammals. If the authorized activity identified in §217.50 is thought to have resulted in the mortality or injury of any marine mammals or in any take of marine mammals not identified in §217.50(b), then the Holder of the Letter of Authorization must notify the Director, Office of Protected Resources, NMFS, or designee, by telephone (301-427-8401), and the Administrator, West Coast Region, NMFS, or designee, by telephone (562-980-3232), within 48 hours of the discovery of the injured or dead animal.

(b) The National Marine Fisheries Service must be informed immediately of any changes or deletions to any portions of the proposed monitoring plan submitted, in accordance with the Letter of Authorization.

(c) The holder of the Letter of Authorization must designate biologically trained, on-site individual(s), approved in advance by NMFS, to record the effects of the launch activities and the resulting noise on pinnipeds.

(d) The holder of the Letter of Authorization must implement the following monitoring measures:

(1) *Visual land-based monitoring.* (i) Prior to each missile launch, an observer(s) will place three autonomous digital video cameras overlooking chosen haul-out sites located varying distances from the missile launch site. Each video camera will be set to record a focal subgroup within the larger haul-out aggregation for a maximum of 4 hours or as permitted by the videotape capacity.

(ii) Systematic visual observations, by those individuals, described in paragraph (c) of this section, of pinniped presence and activity will be conducted and recorded in a field logbook a minimum of 2 hours prior to the estimated launch time and for no less than 1 hour immediately following the launch of target missiles.

(iii) Systematic visual observations, by those individuals, described in paragraph (c) of this section, of pinniped presence and activity will be conducted and recorded in a field logbook a minimum of 2 hours prior to launch, during launch, and for no less than 1 hour after the launch of the BQM-34, BQM-74, Tomahawk, RAM target and similar types of missiles.

(iv) Documentation, both via autonomous video camera and human observer, will consist of:

(A) Numbers and sexes of each age class in focal subgroups;

(B) Description and timing of launch activities or other disruptive event(s);

(C) Movements of pinnipeds, including number and proportion moving, direction and distance moved, and pace of movement;

(D) Description of reactions;

(E) Minimum distances between interacting and reacting pinnipeds;

(F) Study location;

(G) Local time;

(H) Substratum type;

(I) Substratum slope;

(J) Weather condition;

(K) Horizontal visibility; and

(L) Tide state.

(2) *Acoustic monitoring.* (i) During all target missile launches, calibrated recordings of the levels and characteristics of the received launch sounds will be obtained from three different locations of varying distances from the target missile's flight path. To the extent practicable, these acoustic recording locations will correspond with the haul-out sites where video and human observer monitoring is done.

(ii) Acoustic recordings will be supplemented by the use of radar and telemetry systems to obtain the trajectory of target missiles in three dimensions.

(iii) Acoustic equipment used to record launch sounds will be suitable for collecting a wide range of parameters, including the magnitude, characteristics, and duration of each target missile.

(e) The holder of the Letter of Authorization must implement the following reporting requirements:

(1) For each target missile launch, the lead contractor or lead observer for the holder of the Letter of Authoriza-

tion must provide a status report to NMFS, West Coast Regional Office, providing reporting items found under the Letter of Authorization, unless other arrangements for monitoring are agreed upon in writing.

(2) The Navy shall submit an annual report describing their activities and including the following information:

(i) Timing, number, and nature of launch operations;

(ii) Summary of mitigation and monitoring implementation;

(iii) Summary of pinniped behavioral observations; and

(iv) Estimate of the amount and nature of all takes by harassment or by other means.

(3) The Navy shall submit a draft comprehensive technical report to the Office of Protected Resources and West Coast Regional Office, NMFS, 180 days prior to the expiration of the regulations in this subpart, providing full documentation of the methods, results, and interpretation of all monitoring tasks for launches to date plus preliminary information for missile launches during the first 6 months of the regulations.

(4) A revised final comprehensive technical report, including all monitoring results during the entire period of validity of the Letter of Authorization, will be due 90 days after the end of the period of effectiveness of the regulations in this subpart.

(5) The final report will be subject to review and comment by NMFS. Any recommendations made by NMFS must be addressed in the final comprehensive technical report prior to acceptance by NMFS.

(f) Activities related to the monitoring described in paragraphs (c) and (d) of this section, or in the Letter of Authorization issued under §§ 216.106 and 217.57 of this chapter, including the retention of marine mammals, may be conducted without the need for a separate scientific research permit.

(g) In coordination and compliance with appropriate Navy regulations, the NMFS may, at its discretion, place an observer on San Nicolas Island for any activity involved in marine mammal monitoring either prior to, during, or after a missile launch in order to monitor the impact on marine mammals.



**§ 217.56 Applications for Letters of Authorization.**

To incidentally take marine mammals pursuant to the regulations in this subpart, the U.S. citizen (as defined by § 216.6 of this chapter) conducting the activity identified in § 217.50 (the U.S. Navy) must apply for and obtain either an initial LOA in accordance with § 217.57 or a renewal under § 217.58.

**§ 217.57 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (i.e., mitigation); and

(3) Requirements for mitigation, monitoring, and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

**§ 217.58 Renewals and Modifications of Letters of Authorization.**

(a) A Letter of Authorization issued under §§ 216.106 and 217.57 of this chapter for the activity identified in § 217.50 will be renewed or modified upon request of the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision of this chapter), and;

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitiga-

tion, monitoring, or reporting measures (excluding changes made pursuant to the adaptive management provision of this chapter) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis illustrating the change, and solicit public comments before issuing the LOA.

(c) An LOA issued under §§ 216.106 and 217.57 of this chapter for the activity identified in § 217.50 may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with the Navy regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data could contribute to the decision to modify the mitigation, monitoring, and reporting measures in an LOA:

(A) Results from the Navy's monitoring from the previous year(s);

(B) Results from other marine mammal and/or sound research or studies; or

(C) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) *Emergencies.* If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.50(b), a Letter of Authorization may be modified without prior notice or opportunity for public comment. Notice would be published in the FEDERAL REGISTER within 30 days of the action.

**Subpart G—Taking of Marine Mammals Incidental to U.S. Air Force Launches, Aircraft and Helicopter Operations, and Harbor Activities Related to Launch Vehicles From Vandenberg Air Force Base (VAFB), California**

SOURCE: 79 FR 10026, Feb. 24, 2014, unless otherwise noted.

**§ 217.60 Specified activity and specified geographical region.**

(a) Regulations in this subpart apply only to the 30th Space Wing, United States Air Force (USAF), at Vandenberg Air Force Base and those persons it authorizes to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occurs incidental to:

(1) Launching up to 15 space and each year from Vandenberg Air Force Base, for a total of up to 75 missiles over the 5-year period of these regulations,

(2) Launching up to 35 rockets each year from Vandenberg Air Force Base, for a total of up to 175 rocket launches over the 5-year period of these regulations,

(3) Aircraft flight test operations,

(4) Helicopter operations from Vandenberg Air Force Base, and

(5) *Delta Mariner* (or a similar vessel) operations, cargo unloading activities, and harbor maintenance dredging.

(b) The taking of marine mammals by the USAF may be authorized in a Letter of Authorization only if it occurs from the space launch complexes, launch facilities, and test pads on north and south Vandenberg Air Force Base and the Vandenberg Air Force Base harbor on South Base.

**§ 217.61 Effective dates.**

Regulations in this subpart are effective from March 26, 2014 through March 26, 2019.

**§ 217.62 Permissible methods of taking.**

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 217.60 of this chapter, the Holder of the Letter of Authorization (herein after the

USAF) may incidentally, but not intentionally, take marine mammals by harassment, within the area described in § 217.60(b), provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate Letter of Authorization.

(b) The activities identified in § 217.60(a) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 217.60(a) of this chapter is limited to the indicated number of Level B harassment takes on an annual basis of the following species:

(1) Harbor seals (*Phoca vitulina*)—31,161;

(2) California sea lions (*Zalophus californianus*)—465,129;

(3) Northern elephant seals (*Mirounga angustirostris*)—80,024;

(4) Northern fur seals (*Callorhinus ursinus*)—62,500; and

(5) Steller sea lions (*Eumetopias jubatus*)—1,824.

**§ 217.63 Prohibitions.**

Notwithstanding takings contemplated in § 217.62(c) and authorized by a Letter of Authorization issued under §§ 216.106 and 217.66 of this chapter, no person in connection with the activities described in § 217.60 may:

(a) Take any marine mammal not specified in § 217.62(c);

(b) Take any marine mammal specified in § 217.62(c) other than by incidental, unintentional Level B harassment;

(c) Take a marine mammal specified in § 217.62(c) if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under §§ 216.106 and 217.66 of this chapter.

**§ 217.64 Mitigation.**

(a) When conducting the activities identified in § 217.60(a), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106

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and 217.66 of this chapter must be implemented. These mitigation measures include (but are not limited to):

(1) All aircraft and helicopter flight paths must maintain a minimum distance of 1,000 ft (305 m) from recognized seal haul-outs and rookeries (e.g., Point Sal, Purisima Point, Rocky Point), except in emergencies or for real-time security incidents (e.g., search-and-rescue, fire-fighting), which may require approaching pinniped haul-outs and rookeries closer than 1,000 ft (305 m).

(2) For missile and rocket launches, holders of Letters of Authorization must avoid, whenever possible, launches during the harbor seal pupping season of March through June, unless constrained by factors including, but not limited to, human safety, national security, or for space vehicle launch trajectory necessary to meet mission objectives.

(3) Vandenberg Air Force Base must avoid, whenever possible, launches which are predicted to produce a sonic boom on the Northern Channel Islands during harbor seal, elephant seal, California sea lion, and northern fur seal pupping seasons of March through June.

(4) If post-launch surveys determine that an injurious or lethal take of a marine mammal has occurred, the launch procedure and the monitoring methods must be reviewed, in cooperation with the National Marine Fisheries Service (NMFS), and appropriate changes must be made through modification to a Letter of Authorization, prior to conducting the next launch under that Letter of Authorization.

(5) *Delta Mariner* (or a similar vessel) operations, cargo unloading, and harbor maintenance dredging measures:

(i) If activities occur during nighttime hours, turn on lighting equipment before dusk. Lights must remain on for the entire night to avoid startling pinnipeds.

(ii) Initiate operations before dusk.

(iii) Keep construction noises at a constant level (i.e., not interrupted by periods of quiet in excess of 30 minutes) while pinnipeds are present.

(iv) Initiate a gradual start-up of activities to ensure a gradual increase in noise levels if activities cease for

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longer than 30 minutes and pinnipeds are in the area.

(v) Conduct visual monitor, by a qualified observer, of the harbor seals on the beach adjacent to the harbor and on rocks for any flushing or other behaviors as a result of activities described in §217.60(a).

(vi) The *Delta Mariner* and accompanying vessels must enter the harbor only when the tide is too high for harbor seals to haul-out on the rocks; reducing speed to 1.5 to 2 knots (1.5–2 nm/hr; 2.8–3.7 km/hr) once the vessel is within 3 mi (4.83 km) of the harbor. The vessel must enter the harbor stern first, approaching the wharf and moorings at less than 0.75 knot (1.4 km/hr).

(vii) Explore alternate dredge methods and introduce quieter techniques and equipment as they become available.

(6) Additional mitigation measures as contained in a Letter of Authorization.

(b) [Reserved]

### §217.65 Requirements for monitoring and reporting.

(a) Unless specified otherwise in the Letter of Authorization, the USAF must notify the Administrator, West Coast Region, NMFS, by letter or telephone, at least 2 weeks prior to activities possibly involving the taking of marine mammals. If the authorized activity identified in §217.60(a) is thought to have resulted in the mortality or injury of any marine mammals or in any take of marine mammals not identified in §217.62(c), then the USAF must notify the Director, Office of Protected Resources, NMFS, or designee, by telephone (301–427–8401), within 48 hours of the discovery of the injured or dead animal.

(b) To conduct monitoring of launch activities, the USAF must designate qualified, on-site individuals approved in advance by NMFS, as specified in the Letter of Authorization, to:

(1) Conduct observations on pinniped activity in the vicinity of the rookery nearest the launch platform or, in the absence of pinnipeds at that location, at another nearby haul-out, for at least 72 hours prior to any planned launch occurring during the harbor seal pupping season (1 March through 30 June) and continue for a period of time

not less than 48 hours subsequent to launching.

(2) For launches during the harbor seal pupping season (March through June), conduct follow-up surveys within 2 weeks of the launch to ensure that there were no adverse effects on any marine mammals.

(3) Monitor haul-out sites on the Northern Channel Islands, if it is determined by modeling that a sonic boom of greater than 1 psf is predicted to impact one of the Islands between March 1 and June 30, greater than 1.5 psf between July 1 and September 30, and greater than 2 psf between October 1 and February 28. Monitoring will be conducted at the haul-out site closest to the predicted sonic boom impact area.

(4) Investigate the potential for spontaneous abortion, disruption of effective female-neonate bonding, and other reproductive dysfunction.

(5) Supplement observations on Vandenberg and on the Northern Channel Islands with video-recording of mother-pup seal responses for daylight launches during the pupping season.

(6) Conduct acoustic measurements of those launch vehicles that have not had sound pressure level measurements made previously, and

(7) Include multiple surveys each day that surveys are required that record the species, number of animals, general behavior, presence of pups, age class, gender and reaction to launch noise, sonic booms or other natural or human caused disturbances, in addition to recording environmental conditions such as tide, wind speed, air temperature, and swell.

(c) To conduct monitoring of harbor activities, the USAF must designate qualified, on-site individuals approved in advance by NMFS, as specified in the Letter of Authorization. During nighttime activities, the harbor area will be illuminated, and the observer will use a night vision scope. Monitoring activities will consist of the following:

(1) Conducting baseline observation of pinnipeds in the project area prior to initiating project activities.

(2) Conducting and recording observations on pinnipeds in the vicinity of the harbor for the duration of the ac-

tivity occurring when tides are low enough (less than or equal to 2 ft (0.61 m) for pinnipeds to haul out.

(3) Conducting post-construction observations of pinniped haul-outs in the project area to determine whether animals disturbed by the project activities return to the haul-out.

(d) Holders of Letters of Authorization must conduct additional monitoring as required under a Letter of Authorization.

(e) The USAF must submit a report to the West Coast Regional Administrator, NMFS, within 90 days after each launch. This report must contain the following information:

(1) Date(s) and time(s) of the launch,

(2) Design of the monitoring program, and

(3) Results of the monitoring program, including, but not necessarily limited to:

(i) Numbers of pinnipeds present on the haul-out prior to commencement of the launch,

(ii) Numbers of pinnipeds that may have been harassed as noted by the number of pinnipeds estimated to have entered the water as a result of launch noise,

(iii) The length of time pinnipeds remained off the haul-out or rookery,

(iv) Numbers of pinniped adults, juveniles or pups that may have been injured or killed as a result of the launch, and

(v) Behavioral modifications by pinnipeds that were likely the result of launch noise or the sonic boom.

(f) An annual report must be submitted on March 1 of each year.

(g) A final report must be submitted at least 180 days prior to expiration of these regulations. This report will:

(1) Summarize the activities undertaken and the results reported in all previous reports,

(2) Assess the impacts at each of the major rookeries,

(3) Assess the cumulative impacts on pinnipeds and other marine mammals from the activities specified in § 217.60(a), and

(4) State the date(s), location(s), and findings of any research activities related to monitoring the effects on launch noise, sonic booms, and harbor

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activities on marine mammal populations.

### § 217.66 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the USAF must apply for and obtain a Letter of Authorization.

(b) A Letter of Authorization, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If a Letter of Authorization expires prior to the expiration date of these regulations, the USAF must apply for and obtain a renewal of the Letter of Authorization.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by a Letter of Authorization, the USAF must apply for and obtain a modification of the Letter of Authorization as described in § 217.67.

(e) The Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (i.e., mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the Letter of Authorization shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of a Letter of Authorization shall be published in the FEDERAL REGISTER within 30 days of a determination.

### § 217.67 Renewals and modifications of Letters of Authorization.

(a) A Letter of Authorization issued under § 216.106 and § 217.66 of this chapter for the activity identified in § 217.60(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regu-

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lations (excluding changes made pursuant to the adaptive management provision in § 217.67(c)(1) of this chapter), and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous Letter of Authorization under these regulations were implemented.

(b) For Letter of Authorization modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in § 217.67(c)(1)) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed Letter of Authorization in the FEDERAL REGISTER, including the associated analysis illustrating the change, and solicit public comment before issuing the Letter of Authorization.

(c) A Letter of Authorization issued under § 216.106 and § 217.66 of this chapter for the activity identified in § 217.60(a) may be modified by NMFS under the following circumstances:

(1) Adaptive Management—NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with the USAF regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in a Letter of Authorization:

(A) Results from the USAF's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

(ii) If, through adaptive management, the modifications to the mitigation,

monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed Letter of Authorization in the FEDERAL REGISTER and solicit public comment.

(2) Emergencies—If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.62(c) of this chapter, a Letter of Authorization may be modified without prior notice or opportunity for public comment. Notice would be published in the FEDERAL REGISTER within 30 days of the action.

#### **Subpart H—Taking of Marine Mammals Incidental to Space Vehicle and Missile Launches at Kodiak Launch Complex, Alaska**

SOURCE: 76 FR 16318, Mar. 23, 2011, unless otherwise noted.

EFFECTIVE DATE NOTE: At 76 FR 16318, Mar. 23, 2011, subpart H was added, effective Mar. 22, 2011 to Mar. 22, 2016.

##### **§ 217.70 Specified activity and specified geographical region.**

(a) Regulations in this subpart apply only to the incidental taking of marine mammals specified in paragraph (b) of this section by U.S. citizens engaged in space vehicle and missile launch activities at the Kodiak Launch Complex on Kodiak Island, Alaska.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited to 32 juvenile and adult Steller sea lions (*Eumetopius jubatus*), 1,125 Pacific harbor seals (*Phoca vitulina*) of all ages, and 17 harbor seal pups.

##### **§ 217.71 Effective dates.**

Regulations in this subpart are effective from March 22, 2011 through March 22, 2016.

##### **§ 217.72 Permissible methods of taking.**

(a) Under a Letter of Authorization issued pursuant to § 216.106 of this chapter, the Alaska Aerospace Corporation and its contractors may incidentally, but not intentionally, take Steller sea lions and Pacific harbor seals by Level

B harassment and harbor seal pups by Level A harassment or mortality in the course of conducting space vehicle and missile launch activities within the area described in § 217.70(a), provided all terms, conditions, and requirements of these regulations and such Letter of Authorization are complied with.

(b) The activities identified in § 217.70(a) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitat.

##### **§ 217.73 Prohibitions.**

The following activities are prohibited:

(a) The taking of a marine mammal that is other than unintentional.

(b) The violation of, or failure to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under § 216.106 of this chapter.

(c) The incidental taking of any marine mammal of a species not specified, or in a manner not authorized, in this subpart.

##### **§ 217.74 Mitigation.**

(a) The activity identified in § 217.70(a) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitats. When conducting operations identified in § 217.70(a), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 of this chapter and 217.76 must be implemented. These mitigation measures include (but are not limited to):

(1) Security overflights by helicopter associated with a launch will not approach occupied pinniped haulouts on Ugak Island by closer than 0.25 mile (0.4 km), and will maintain a vertical distance of 1000 ft (305 m) from the haulouts when within 0.5 miles (0.8 km), unless indications of human presence or activity warrant closer inspection of the area to assure that national security interests are protected in accordance with law;

(2) For missile and rocket launches, holders of Letters of Authorization must avoid launches during the harbor seal pupping season of May 15 through

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June 30, except when launches are necessary for the following purposes: human safety, national security, space vehicle launch trajectory necessary to meet mission objectives, or other purposes related to missile or rocket launches.

(3) All flights by fixed-wing aircraft associated with the marine mammal abundance quarterly surveys must maintain a minimum altitude of 500 ft (152 m) and remain 0.25 miles from recognized seal haulouts.

(4) If launch monitoring or quarterly aerial surveys indicate that the distribution, size, or productivity of the potentially affected pinniped populations has been affected due to the specified activity, the launch procedures and the monitoring methods will be reviewed, in cooperation with NMFS, and, if necessary, appropriate changes may be made through modifications to a given LOA, prior to conducting the next launch of the same vehicle under that LOA.

(5) Additional mitigation measures as contained in a Letter of Authorization.

(b) [Reserved]

### §217.75 Requirements for monitoring and reporting.

(a) Holders of Letters of Authorization issued pursuant to §§216.106 of this chapter and 217.76 for activities described in §217.70(a) are required to cooperate with NMFS, and any other Federal, State, or local agency with authority to monitor the impacts of the activity on marine mammals. Unless specified otherwise in the Letter of Authorization, the Holder of the Letter of Authorization must notify the Administrator, Alaska Region, NMFS, by letter, e-mail or telephone, prior to each launch. If the authorized activity identified in §217.70(a) is thought to have resulted in the take of marine mammals not identified in §217.70(b), then the Holder of the Letter of Authorization must notify the Director, Office of Protected Resources, NMFS, or designee, by telephone (301-713-2289), within 48 hours of the discovery of the take.

(b) Holders of Letters of Authorization must designate qualified protected species observers, approved in advance

by NMFS, as specified in the Letter of Authorization, to:

(1) Deploy for AAC a remote camera system designed to detect pinniped responses to rocket launches for at least the first five launches conducted under these regulations. AAC will conduct visual monitoring for at least 2 hours before, during, and 2 hours after launch;

(2) Ensure a remote camera system will be in place and operating in a location which allows visual monitoring of a harbor seal rookery, if a launch during the harbor seal pupping season cannot be avoided;

(3) Relocate the camera system to or re-aim the camera system on another haulout to be chosen in cooperation with NMFS after the first five launches with harbor seals present;

(4) Review and log pinniped presence, behavior, and re-occupation time data from the visual footage obtained from the remote camera system and report results to NMFS within 90 days post launch;

(5) Obtain, whenever a new class of rocket is flown from the Kodiak Launch Complex, a real-time sound pressure and sound exposure record for documentation purposes and to correlate with the behavioral response record. Two monitors shall be used: one shall be placed at the established recording location known as Narrow Cape, and the other as close as practical to the remote video system;

(6) Conduct quarterly aerial surveys, ideally during midday coinciding with low tide, to obtain data on pinniped presence, abundance, and behavior within the action area to determine long-term trends in pinniped haulout use. Results of these quarterly surveys will be reported once as part of the year-end summary report that will accompany the request for a new LOA.

(c) Holders of Letters of Authorization must conduct additional monitoring as required under an annual Letter of Authorization.

(d) Holders of Letters of Authorization must submit a report to the Alaska Region Administrator, NMFS, within 90 days after each launch. This report must contain the following information:

(1) Date(s) and time(s) of the launch;

(2) Location of camera system and acoustic recorders (if used);

(3) Design of the monitoring program and a description of how data is stored and analyzed; and

(4) Results of the monitoring program, including, but not necessarily limited to:

(i) Numbers of pinnipeds, by species and age class (if possible), present on the haulout prior to commencement of the launch;

(ii) Numbers of pinnipeds, by species and age class (if possible), that may have been harassed, including the number that entered the water as a result of launch noise;

(iii) The length of time pinnipeds remained off the haulout during post-launch monitoring;

(iv) Number of harbor seal pups that may have been injured or killed as a result of the launch; and

(v) Other behavioral modifications by pinnipeds that were likely the result of launch noise.

(5) Results of sound pressure and sound exposure level monitoring will be reported in flat weighted, A-weighted, and peak measurements.

(e) An annual report must be submitted at the time of request for a renewal of the Letter of Authorization; it will include results of the aerial quarterly trend counts of pinnipeds at Ugak Island.

(f) A final report must be submitted at least 90 days prior to expiration of these regulations if new regulations are sought or 180 days after expiration of regulations. This report will:

(1) Summarize the activities undertaken and the results reported in all previous reports;

(2) Assess the impacts of launch activities on pinnipeds within the action area, including potential for pup injury and mortality; and

(3) Assess the cumulative impacts on pinnipeds and other marine mammals from multiple rocket launches.

#### **§ 217.76 Letter of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time specified in the Letter of Authorization, but a Letter of Authorization may not be valid beyond the effective period of the regulations.

(b) A Letter of Authorization with a period of validity less than the effective period of the regulations in this subpart may be renewed subject to renewal conditions in § 217.76.

(c) A Letter of Authorization will set forth:

(1) The number of marine mammals, by species and age class, authorized to be taken;

(2) Permissible methods of incidental taking;

(3) Specified geographical region;

(4) Means of effecting the least practicable adverse impact on the species of marine mammals authorized for taking and its habitat; and

(5) Requirements for monitoring and reporting incidental takes.

(d) Issuance of a Letter of Authorization will be based on a determination that the total taking by the activity as a whole will have no more than a negligible impact on the affected species or stocks of marine mammal(s).

(e) Notice of issuance or denial of a Letter of Authorization will be published in the FEDERAL REGISTER within 30 days of a determination.

#### **§ 217.77 Renewal of a Letter of Authorization and adaptive management.**

(a) A Letter of Authorization issued under § 216.106 of this chapter and § 217.76 for the activity identified in § 217.70(a) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application for a Letter of Authorization submitted under § 217.76 will be undertaken and that there will not be a substantial modification to the described activity, mitigation, or monitoring undertaken during the upcoming season;

(2) Timely receipt of and acceptance by NMFS of the monitoring reports required under § 217.75;

(3) A determination by NMFS that the mitigation, monitoring, and reporting measures required under §§ 217.74 and 217.75 and the Letter of Authorization were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization; and



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(4) A determination that the number of marine mammals taken by the activity will have no more than a negligible impact on the affected species or stocks of marine mammal(s), and that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(b) If a request for a renewal of a Letter of Authorization issued under §§216.106 and 216.128 of this chapter indicates that a substantial modification to the described work, mitigation, or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days to review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration; and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER within 30 days of a determination.

(d) NMFS, in response to new information and in consultation with the AAC, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation or monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the AAC's monitoring from the previous year.

(2) Results from general marine mammal and sound research.

### §217.78 Modifications to a Letter of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to a Letter of Authorization issued pursuant to the provisions

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of this subpart shall be made by NMFS until after notification and an opportunity for public comment has been provided. A renewal of a Letter of Authorization under §217.77 without modification is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in §217.70(b), a Letter of Authorization may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days subsequent to the action.

### Subpart I—Taking of Marine Mammals Incidental to Naval Explosive Ordnance Disposal School (NEODS) Training Operations

SOURCE: 77 FR 16736, Mar. 22, 2012, unless otherwise noted.

### §217.80 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the incidental taking of those marine mammals specified in paragraph (b) of this section by the United States Air Force, Headquarters 96th Air Base Wing, Eglin Air Force Base, and those persons who engage in activities described in paragraphs (a)(1) through (7) of this section and the area set forth in paragraph (b) of this section.

(1) NEODS missions involving underwater detonations of small, live explosive charges adjacent to inert mines in order to disable the mine function,

(2) Live training events occurring eight times annually, averaging one event occurring every 6 to 7 weeks,

(3) Four of the training events involving 5-lb charges, and four events involving 10-lb charges,

(4) Up to 20 5-lb detonations and twenty 10-lb detonations annually, for a total of 40 detonations,

(5) The five charges occurring for each training event shall be detonated

individually with a maximum separation time of 20 minutes between each detonation,

(6) Mine shapes and debris shall be recovered and removed from the Gulf of Mexico waters when training is completed, and

(7) Each training team has two days to complete their entire evolution (*i.e.*, detonation of five charges). If operations cannot be completed on the first live demolition day, the second live demolition day shall be utilized to complete the evolution.

(b) The incidental take of marine mammals at Eglin Air Force Base, within the Eglin Military Complex, including three sites in the Eglin Gulf Test and Training Range at property off Santa Rosa Island, Florida, in the northern Gulf of Mexico, under the activity identified in paragraph (a) of this section, is limited to the following species: Atlantic bottlenose dolphins (*Tursiops truncatus*).

(1) The latitude/longitude of corners of W-151 in the Eglin Gulf Test and Training Range are:

- (i) 30.24006° North, -86.808838° West
- (ii) 29.539011° North, -84.995536° West
- (iii) 28.03949° North, -85.000147° West
- (iv) 28.027598° North, -85.199395° West
- (v) 28.505304° North, -86.799043° West

(2) The latitude/longitude of corners of W-151A in the Eglin Gulf Test and Training Range are:

- (i) 30.24006° North, -86.808838° West
- (ii) 30.07499° North, -85.999327° West
- (iii) 29.179968° North, -85.996341° West
- (iv) 29.384439° North, -86.802579° West

#### § 217.81 Effective dates.

Regulations in this subpart are effective from April 23, 2012, through April 24, 2017.

#### § 217.82 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to § 216.106 of this chapter and § 217.87, the U.S. Department of the Air Force, Headquarters 96th Air Base Wing, Eglin Air Force Base (U.S. Air Force), its contractors, and clients, may incidentally, but not intentionally, take marine mammals by Level B harassment, within the area described in § 217.80, provided the activity is in compliance with all terms,

conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The incidental taking of marine mammals is authorized for the species listed in § 217.80(b) and is limited to Level B harassment.

(c) The incidental taking of an average of 10 individuals annually and 50 individuals during the 5-year rule, for Atlantic bottlenose dolphins.

(d) The U.S. Air Force shall suspend NEODS training operations until it obtains additional authorization for the take of marine mammals if:

(1) A marine mammal is injured, seriously injured, or killed during training operations;

(2) The injury, serious injury, or death could be associated with the activities; and

(3) After coordination and concurrence with NMFS, the U.S. Air Force determines that supplementary measures are unlikely to reduce the risk of injury, serious injury or death to a very low level, require the U.S. Air Force to suspend its activities until an authorization for such taking has been obtained.

#### § 217.83 Prohibitions.

Notwithstanding takings contemplated in § 217.80 and authorized by a Letter of Authorization issued under §§ 216.106 of this chapter and 217.87, no person in connection with the activities described in § 217.80 may:

(a) Take any marine mammal not specified in § 217.80(b);

(b) Take any marine mammal specified in § 217.80(b) other than by incidental take as specified in § 217.82(a) through (d);

(c) Take a marine mammal specified in § 217.80(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under §§ 216.106 of this chapter and 217.87.

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### § 217.84 Mitigation.

(a) The activity identified in § 217.80(a) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitats. When conducting operations identified in § 217.80(a), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 of this chapter and 217.87 must be implemented. These mitigation measures include (but are not limited to):

(1) Underwater detonations using timed delay devices will only be conducted during daylight hours. The time of detonation shall be limited to an hour after sunrise and an hour before sunset.

(2) NEODS missions shall be postponed if:

(i) The Beaufort sea state is greater than scale number three. Such a delay would maximize detection of marine mammals.

(ii) Large concentrations of fish, jellyfish, and/or large *Sargassum* rafts are observed within the mitigation-monitoring zone. The delay would continue until the fish, jellyfish, and/or *Sargassum* rafts that cause the postponement are confirmed to be outside the mitigation-monitoring zone.

(3) Time delays longer than 10 minutes will not be used. Initiation of the timer device will not start until the mitigation-monitoring zone is clear of marine mammals for 30 minutes.

(4) A calculated mitigation-monitoring zone will be established around each underwater detonation location based on charge weight and length of time-delay used. When conducting surveys within the mitigation-monitoring zone radius (but always outside the detonation plume radius/human safety zone) and travel in a circular pattern around the detonation point, surveying the inner (toward the detonation site) and outer (away from the detonation site) areas. For a survey radius of 914.4 meters, the boat will be positioned at 457.2 meters from the detonation point. Similarly, for a survey radius of 1,280.2 meters, boats will be positioned at 640.1 meter distance.

(5) For a survey radius of 914.4 meters, two boats are required. For a radius of 1,280.2 meters, either three

boats or two boats/one helicopter are required.

(6) When using two boats, each boat will be positioned on opposite sides of the detonation location, separated by 180 degrees. When using three boats, each boat will be separated by 120 degrees (equidistant from each other).

(7) Two observers in each boat will conduct continuous visual surveys of the mitigation-monitoring zone for the entire duration of the training event, including at least 30 minutes prior to detonation. Observers will search the mitigation-monitoring zone for the presence of marine mammals, and other marine species such as sea turtles, diving birds, large concentrations of fish or jellyfish, and large *Sargassum* mats. The presence of diving birds, fish, jellyfish, and *Sargassum* may indicate an increased likelihood of dolphin presence.

(8) To the extent practicable, boats will maintain 18.5 kilometer per hour search speed. This search speed is expected to ensure adequate coverage of the buffer zone. While weather conditions and sea state may require slower speeds in some instances, 18.5 kilometers per hour is considered a prudent, safe, and executable speed that will allow adequate surveillance. For a 914.4 meter survey zone, a boat traveling at 18.5 kilometers per hour and 457.2 meters from the detonation point would circle the point approximately 3.2 times during a 30 minute survey period. By using two boats, approximately 6.4 circles would be completed in total. Similarly, for a 1,280.2 meter radius, each boat would circle the detonation point approximately 2.3 times within 30 minutes, and use of three boats would result in 6.9 total circles.

(9) If available, a U.S. Navy helicopter can be used in lieu of one of the survey boats, so long as safety of flight is not jeopardized. U.S. Navy helicopter pilots are trained to conduct searches for relatively small objects in the water, such as a missing person. A helicopter search pattern is dictated by standard U.S. Navy protocols and accounts for multiple variables, such as size and shape of the search area, size of the object, and environmental conditions, among others.

(10) The mitigation-monitoring zone will be surveyed for 30 minutes prior to detonation and continue for 30 minutes after detonation (concentrated on the area down current of the test site), in order to monitor for marine mammals and other protected species. It is the U.S. Air Force's (on behalf of the U.S. Navy) intent to conduct five successive detonations with a maximum time of 20 minutes between detonations, although a variety of factors can cause a delay of longer than 20 minutes between detonations, although a variety of factors can cause a delay of longer than 20 minutes, including a delay until the following day. Monitoring would continue during the 20 minutes time between detonations, and would serve as both post-detonation monitoring as well as pre-mission monitoring for the next detonation. If the time between detonations is delayed beyond 20 minutes, post-mission monitoring will be conducted for 30 minutes. At the conclusion of the final detonation, post-monitoring will be conducted for 30 minutes.

(11) Other personnel besides designated observers shall also maintain situational awareness of the presence of marine mammals within the mitigation-monitoring zone to the extent practicable given dive safety considerations.

(12) Divers placing the charges on mines will observe the immediate underwater area around the detonation site for marine mammals and other marine species such as diving birds, sea turtles, and Gulf sturgeon, and report sightings to surface observers.

(13) If a marine mammal is sighted within an established mitigation-monitoring zone or moving towards it, underwater detonation events will be postponed or suspended until the marine mammal that caused the postponement/suspension of training operations has voluntarily left the area and the area is clear of marine mammals for at least 30 minutes.

(14) If a marine mammal is detected within or about to enter an established mitigation-monitoring zone and subsequently cannot be reacquired, the mission will be postponed or suspended until the last verified location is outside the mitigation-monitoring zone,

the animals is moving away from the area, and the area is clear of marine mammals for at least 30 minutes.

(15) Any marine mammal observed after an underwater detonation either injured or exhibiting signs of distress will be reported to Eglin Air Force Base. Eglin Air Force Base will coordinate with other members of marine mammal stranding networks, as appropriate, and report these events to NMFS or U.S. Fish and Wildlife Service. The report will contain date and time of sighting, location, species description, and indications of the animal's status.

(16) Training operations shall be suspended if the conditions of § 217.83(a)-(d) regarding the injury, serious injury, or death of a marine mammal during NEODS training operations are met.

(17) Additional mitigation measures as contained in a Letter of Authorization.

(b) [Reserved]

#### **§ 217.85 Requirements for monitoring and reporting.**

(a) Holders of Letters of Authorization pursuant to § 216.106 of this chapter and § 217.87 for activities described in § 216.80(a) are required to cooperate with NMFS, and any other Federal, state, or local agency with authority to monitor the impacts of the activity on marine mammals. Unless specified otherwise in the Letter of Authorization, the Holder of the Letter of Authorization must notify the Administrator, Southeast Region, NMFS, by letter or telephone, prior to activities possibly involving the taking of marine mammals. If the authorized activity identified in § 217.80(a) is thought to have resulted in the mortality or injury of any marine mammals or in any take of marine mammals not identified in § 217.80(b), then the Holder of the Letter of Authorization must, in addition to complying with the requirements of § 217.82(a)-(d), notify the Director, Office of Protected Resources, NMFS, or designee, by telephone (301-427-8400), within 24 hours of the discovery of the injured or dead animal.

(b) Holders of Letters of Authorization must designate trained, qualified, on-site individuals approved in advance by NMFS, as specified in the Letter of

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Authorization, to perform the following monitoring requirements:

(1) For NEODS testing, areas to be used in missions shall be visually monitored for marine mammal presence from a surface support vessel prior to detonation of mine neutralization charges. Monitoring shall be conducted 30 minutes before missions to clear the mitigation-monitoring zone. Post-mission monitoring shall also be conducted for 30 minutes after the final detonation (concentrated on the area down current of the test site). If marine mammals are inside the mitigation-monitoring zone, detonations shall be postponed until they have left the area. The observer on the vessel must be equipped with the proper optical equipment and lines of communication in order to recommend the decision to move forward with the mission.

(2) Monitoring shall occur pre-mission (for 30 minutes), throughout the mission, and post-mission (for 30 minutes). Post-mission monitoring shall concentrate on the area down current of the test site.

(3) Survey clearance procedures shall be conducted using best operational methods possible. After the mitigation-monitoring zone is cleared, all dolphins and protected species indicators (e.g., *Sargassum* rafts) shall be avoided to the maximum extent possible.

(4) Clearance procedures shall be re-conducted if dolphins or protected species indicators (e.g., *Sargassum* rafts) are encountered.

(5) After conducting post-mission monitoring, NEODS training operations data as required by Eglin Air Force Base's Natural Resources Section, 96 CEG/CEVSN shall be reported. Post-mission monitoring shall commence immediately following each detonation and shall be concentrated on the area down current of the test site. If any injured or dead marine mammals are observed, that information will be reported and coordinated with marine animals stranding networks.

(6) An annual summary (coordinated through 96 CEG/CEVSN) of mission observations shall be submitted to: NMFS, Southeast Regional Office, Protected Resources Division, 9721 Executive Center Drive North, St. Petersburg, Florida 33702; and NMFS, Office

of Protected Resources, 1315 East West Highway, Silver Spring, Maryland 20910.

(c) Holders of Letters of Authorization must conduct additional monitoring as required under an annual Letter of Authorization.

(d) Holders of Letters of Authorization must submit an annual report summarizing the specified activity as well as monitoring and mitigation data to the Southeast Regional Administrator and Director of the Office of Protected Resources, NMFS, within 90 days after the conclusion of the NEODS training operations. This report must contain the following information:

(1) Date(s), time(s), and location(s) of explosive activities,

(2) Design of the monitoring program,

(3) Results of the monitoring program including, but not necessarily limited to:

(i) Species counts,

(ii) Numbers of observed disturbances,

(iii) Descriptions of the disturbance behaviors before, during, and after explosive activities,

(iv) Bearing and distances,

(v) Observations of unusual behaviors, numbers, or distributions of marine mammals in the activity area shall be reported to NMFS and the U.S. Fish and Wildlife Service so that any potential follow-up observations can be conducted by the appropriate personnel. In addition, observations of tag-bearing marine mammals, sea turtles, and fish carcasses as well as any rare or unusual species of marine mammals and fish shall be reported to NMFS and U.S. Fish and Wildlife Service.

(e) An annual report (referred to in §217.85(d)) must be submitted at the time of notification of the renewal of the Letter of Authorization.

(f) A draft comprehensive final report must be submitted at least 180 days prior to expiration of these regulations. This comprehensive technical report shall provide full documentation of methods, results, and interpretation of all monitoring during the first four

and a half years of the Letter of Authorization. A revised final comprehensive technical report, including all monitoring results during the entire period of the Letters of Authorization, must be submitted 90 days after the end of the period of effectiveness of the regulations. This report shall summarize the activities undertaken and the results reported in all previous reports.

(g)(1) In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by a Letter of Authorization, such as an injury, serious injury, or mortality, Eglin Air Force Base will immediately cease the specified activities and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS at 301-427-8401 and/or by email to [Jolie.Harrison@noaa.gov](mailto:Jolie.Harrison@noaa.gov) and [Howard.Goldstein@noaa.gov](mailto:Howard.Goldstein@noaa.gov), and the NMFS Southeast Regional Marine Mammal Stranding Network at 877-433-8299 ([Blair.Mase@noaa.gov](mailto:Blair.Mase@noaa.gov) and [Erin.Fougeres@noaa.gov](mailto:Erin.Fougeres@noaa.gov)) (Florida Marine Mammal Stranding Hotline at 888-404-3922). The report must include the following information:

- (i) Time, date, and location (latitude/longitude) of the incident;
- (ii) Description of the incident;
- (iii) Status of all noise-generating source use in the 24 hours preceding the incident;
- (iv) Water depth;
- (v) Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- (vi) Description of all marine mammal observations in the 24 hours preceding the incident;
- (vii) Species identification or description of the animal(s) involved;
- (viii) Fate of the animal(s); and
- (ix) Photographs or video footage of the animal(s) (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with Eglin Air Force Base to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. Eglin Air Force Base may not re-

sume their activities until notified by NMFS via letter or email, or telephone.

(2) In the event that Eglin Air Force Base discovers an injured or dead marine mammal, and the lead observer determines that the cause of injury or death is unknown and the death is relatively recent (*i.e.*, less than a moderate state of decomposition as described in the next paragraph), Eglin Air Force Base will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301-427-8401, and/or by email to [Jolie.Harrison@noaa.gov](mailto:Jolie.Harrison@noaa.gov) and [Howard.Goldstein@noaa.gov](mailto:Howard.Goldstein@noaa.gov) and the NMFS Southeast Region Marine Mammal Stranding Network (877-433-8299) and/or by email to the Southeast Regional Stranding Coordinator ([Blair.Mase@noaa.gov](mailto:Blair.Mase@noaa.gov)) and Southeast Regional Stranding Program Administrator ([Erin.Fougeres@noaa.gov](mailto:Erin.Fougeres@noaa.gov)). The report must include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with Eglin Air Force Base to determine whether modifications in the activities are appropriate.

(3) In the event that Eglin Air Force Base discovers an injured or dead marine mammal, and the lead observer determines that the injury or death is not associated with or related to the activities authorized in the Letter of Authorization (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), Eglin Air Force Base will report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301-427-8401, and/or by email to [Jolie.Harrison@noaa.gov](mailto:Jolie.Harrison@noaa.gov) and [Howard.Goldstein@noaa.gov](mailto:Howard.Goldstein@noaa.gov), and the NMFS Southeast Regional Marine Mammal Stranding Network (877-433-8299), and/or by email to the Southeast Regional Stranding Coordinator ([Blair.Mase@noaa.gov](mailto:Blair.Mase@noaa.gov)) and Southeast Regional Stranding Program Administrator ([Erin.Fougeres@noaa.gov](mailto:Erin.Fougeres@noaa.gov)), within 24 hours of discovery. Eglin Air Force Base will provide photographs or video footage (if available) or other documentation of the stranded animals

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sighting to NMFS and the Marine Mammal Stranding Network.

### **§217.86 Applications for Letters of Authorization.**

(a) To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by §216.103) conducting the activity identified in §217.80(a) must apply for and obtain either an initial Letter of Authorization in accordance with §217.87 or a renewal under §217.88.

(b) The application must be submitted to NMFS at least 30 days before the activity is scheduled to begin.

(c) Application for a Letter of Authorization and for renewals of Letters of Authorization must include the following:

(1) Name of the U.S. citizen requesting the authorization;

(2) A description of the activity, the dates of the activity, and the specific location of the activity; and

(3) Plans to monitor the behavior and effects of the activity on marine mammals.

(d) A copy of the Letter of Authorization must be in the possession of the persons conducting activities that may involve incidental takings of marine mammals.

(e) [Reserved]

### **§217.87 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, shall be valid for a period of time not to exceed the period of validity of this subpart.

(b) The Letter of Authorization shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (*i.e.*, mitigation); and

(3) Requirements for mitigation, monitoring, and reporting.

(c) Issuance and renewal of the Letter of Authorization shall be based on a determination that the total number of marine mammals taken by the activity as a whole shall have no more than a negligible impact on the affected species or stock of marine mammal(s).

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### **§217.88 Renewal of Letters of Authorization and adaptive management.**

(a) A Letter of Authorization issued under §216.106 of this chapter and §217.87 for the activity identified in §217.80(a) shall be renewed upon a request by the applicant or determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations, provided that:

(1) NMFS is notified that the activity described in the application submitted under §217.86 shall be undertaken and there shall not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) NMFS has received, reviewed, and accepted the monitoring reports required under §217.85(d) and (e) and the Letter of Authorization issued under §217.87;

(3) NMFS determines that the mitigation, monitoring, and reporting measures required under §§217.84 and 217.85 and the Letter of Authorization issued under §§216.106 and 217.87 of this chapter, were undertaken and shall be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization; and

(4) NMFS makes the determination required by §217.87(c).

(b) If either a request for a renewal of a Letter of Authorization issued under §216.106 of this chapter and §217.88, or a determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations indicates that a substantial modification, as determined by NMFS, to the described work, mitigation or monitoring undertaken during the upcoming season shall occur, NMFS shall publish a proposed modification to the Letter of Authorization in the FEDERAL REGISTER and provide the public a period of 30 days for review and comment. Review and comment on renewals or modifications of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed substantive changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization shall be published in the FEDERAL REGISTER.

(d) Adaptive Management—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with the U.S. Air Force regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the U.S. Air Force's monitoring from the previous year;

(2) Results from marine mammal and sound research; or

(3) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

#### **§217.89 Modifications of Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS issued pursuant to §216.106 of this chapter and §217.87 of this chapter and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under §217.88, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in §217.80(b), a Letter of Authorization issued pursuant to §216.106 of this chapter and §217.87 of this chapter may be substantively

modified without prior notification and an opportunity for public comment. Notification shall be published in the FEDERAL REGISTER within 30 days subsequent to the action.

### **Subparts J–K [Reserved]**

### **Subpart L—Taking Marine Mammals Incidental to Conducting Precision Strike Weapon and Air-to-Surface Gunnery Missions at Eglin Gulf Test and Training Range (EGTTR) in the Gulf of Mexico**

SOURCE: 79 FR 13588, Mar. 11, 2014, unless otherwise noted.

#### **§217.110 Specified activity and specified geographical region.**

(a) Regulations in this subpart apply only to the U.S. Air Force for the incidental taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Air Force is only authorized if it occurs within the Eglin Air Force Base Gulf Test and Training Range (as depicted in Figure 1–9 of the Air Force's Request for a Letter of Authorization). The EGTTR is the airspace over the Gulf of Mexico beyond 3 nm from shore that is controlled by Eglin Air Force Base. The specified activities will take place within the boundaries of Warning Area W–151. The inshore and offshore boundaries of W–151 are roughly parallel to the shoreline contour. The shoreward boundary is 3 nm from shore, while the seaward boundary extends approximately 85 to 100 nm offshore, depending on the specific location. W–151 has a surface area of approximately 10,247 nm<sup>2</sup> (35,145 km<sup>2</sup>), and includes water depths ranging from approximately 20 to 700 m.

(c) The taking of marine mammals by the Air Force is only authorized if it occurs incidental to the following activities within the designated amounts of use:



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(1) The use of the following Precision Strike Weapons (PSWs) for PSW training activities, in the amounts indicated below:

(i) Joint Air-to-Surface Stand-Off Missile (JASSM) AGM-158 A and B—two live shots (single) and 4 inert shots (single) per year;

(ii) Small-diameter bomb (SDB) GBU-39/B—six live shots per year, with two of the shots occurring simultaneously, and 12 inert shots per year, with up to two occurring simultaneously.

(2) The use of the following ordnance for daytime Air-to-Surface (AS) Gun-nery training activities, in the amounts indicated below:

(i) 105 mm HE Full Up (FU)—25 missions per year with 30 rounds per mission;

(ii) 40 mm HE—25 missions per year with 64 rounds per mission;

(iii) 25 mm HE—25 mission per year with 560 rounds per mission.

(3) The use of the following ordnance for nighttime Air-to-Surface (AS) Gun-nery training activities, in the amounts indicated below:

(i) 105 mm HE Training Round (TR)—45 missions per year with 30 rounds per mission;

(ii) 40 mm HE—45 missions per year with 64 rounds per mission;

(iii) 25 mm HE—45 mission per year with 560 rounds per mission.

### §217.111 Effective dates.

Regulations in this subpart are effective March 11, 2014 and applicable to Eglin AFB March 5, 2014, through March 4, 2019.

### §217.112 Permissible methods of taking.

(a) Under a Letter of Authorization issued pursuant to §§216.106 and 217.117 of this chapter, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals by Level A and Level B harassment within the area described in §217.110(b) of this chapter, provided the activity is in compliance with all terms, conditions, and requirements of this subpart and the appropriate Letter of Authorization.

(b) The activities identified in §217.110(c) of this chapter must be con-

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ducted in a manner that minimizes, to the greatest extent practicable, any adverse impact on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in §217.110(c) is limited to the following species, by the indicated method of take and the indicated number:

(1) Level B Harassment:

(i) Atlantic bottlenose dolphin (*Tursiops truncatus*)—2,200 (an average of 444 annually);

(ii) Atlantic spotted dolphin (*Stenella frontalis*)—1,765 (an average of 353 annually);

(iii) Pantropical spotted dolphin (*S. attenuate*)—15 (an average of 3 annually);

(iv) Spinner dolphin (*S. longirostris*)—15 (an average of 3 annually);

(v) Dwarf or pygmy sperm whale (*Kogia simus* or *Kogia breviceps*)—10 (an average of 2 annually).

(2) Level A Harassment:

(i) Atlantic bottlenose dolphin (*Tursiops truncatus*)—25 (an average of 5 annually);

(ii) Atlantic spotted dolphin (*Stenella frontalis*)—20 (an average of 4 annually).

### §217.113 Prohibitions.

No person in connection with the activities described in §217.110 shall:

(a) Take any marine mammal not specified in §217.112(c);

(b) Take any marine mammal specified in §217.112(c) other than by incidental take as specified in §217.112(c)(1) and (c)(2);

(c) Take a marine mammal specified in §217.112(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under §§216.106 and 217.117 of this chapter.

### §217.114 Mitigation.

(a) The activities identified in §217.110(c) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitats. When conducting operations identified in §217.110(c), the mitigation measures

contained in the Letter of Authorization issued under §§216.106 and 217.117 of this chapter must be implemented.

(b) Precision Strike Weapon Missions:

(1) Safety Zones;

(i) For the JASSM, the Air Force must establish and monitor a safety zone for marine mammals with a radius of 2.0 nm (3.7 km) from the center of the detonation and a buffer zone with a radius of 1.0 nm (1.85 km) radius from the outer edge of the safety zone.,

(ii) For the SDB, the holder of the Letter of Authorization must establish and monitor a safety zone for marine mammals with a radius of no less than 5 nm (9.3 km) for single bombs and 10 nm (18.5 km) for double bombs and a buffer zone from the outer edge of the safety zone with a radius of at least 2.5 nm (4.6 km) for single bombs and 5 nm (18.5 km) for double bombs.

(2) For PSW missions, the holder of the Letter of Authorization must comply with the monitoring requirements, including pre-mission monitoring, set forth in §217.115(c).

(3) When detonating explosives:

(i) If any marine mammals or sea turtles are observed within the designated safety zone or the buffer zone prescribed in the condition in paragraph (b)(1) of this section or that are on a course that will put them within the safety zone prior to JASSM or SDB launch, the launching must be delayed until all marine mammals are no longer within the designated safety zone.

(ii) If any marine mammals are detected in the buffer zone and subsequently cannot be reacquired, the mission launch will not continue until the next verified location is outside of the safety zone and the animal is moving away from the mission area.

(iii) If large Sargassum rafts or large concentrations of jellyfish are observed within the safety zone, the mission launch will not continue until the Sargassum rafts or jellyfish that caused the postponement are confirmed to be outside of the safety zone due to the current and/or wind moving them out of the mission area.

(iv) If weather and/or sea conditions preclude adequate aerial surveillance for detecting marine mammals or sea

turtles, detonation must be delayed until adequate sea conditions exist for aerial surveillance to be undertaken. Adequate sea conditions means the sea state does not exceed Beaufort sea state 3.5 (i.e., whitecaps on 33 to 50 percent of surface; 0.6 m (2 ft) to 0.9 m (3 ft) waves), the visibility is 5.6 km (3 nm) or greater, and the ceiling is 305 m (1,000 ft) or greater.

(v) To ensure adequate daylight for pre- and post-detonation monitoring, mission launches may not take place earlier than 2 hours after sunrise, and detonations may not take place later than 2 hours prior to sunset, or whenever darkness or weather conditions will preclude completion of the post-test survey effort described in §217.115.

(vi) If post-detonation surveys determine that a serious injury or lethal take of a marine mammal has occurred, the test procedure and the monitoring methods must be reviewed with the National Marine Fisheries Service and appropriate changes to avoid unauthorized take must be made prior to conducting the next mission detonation.

(vii) Mission launches must be delayed if aerial or vessel monitoring programs described under §217.115 cannot be fully carried out.

(c) Air-to-Surface Gunnery Missions:

(1) Sea State Restrictions:

(i) If daytime weather and/or sea conditions preclude adequate aerial surveillance for detecting marine mammals and other marine life, air-to-surface gunnery exercises must be delayed until adequate sea conditions exist for aerial surveillance to be undertaken. Daytime air-to-surface gunnery exercises will be conducted only when sea surface conditions do not exceed Beaufort sea state 4 (i.e., wind speed 13–18 mph (11–16 knots); wave height 1 m (3.3 ft)), the visibility is 5.6 km (3 nm) or greater, and the ceiling is 305 m (1,000 ft) or greater.

(ii) [Reserved]

(2) Pre-mission and Mission Monitoring:

(i) The aircrews of the air-to-surface gunnery missions will initiate location and surveillance of a suitable firing site immediately after exiting U.S. territorial waters (> 12 nm).

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(ii) Prior to each firing event, the aircraft crew will conduct a visual and/or instrument survey of the 5-nm (9.3-km) wide prospective target area to locate any marine mammals that may be present.

(A) The AC-130 gunship will conduct at least two complete orbits at a minimum safe airspeed around a prospective target area at an altitude of approximately 6,000 ft (1,829 m).

(B) If marine mammals are not detected, the AC-130 can then continue orbiting the selected target point as it climbs to the mission testing altitude.

(C) During the low altitude orbits and the climb to testing altitude, aircraft crew will scan the sea surface within the aircraft's orbit circle for the presence of marine mammals.

(D) The AC-130's optical and electronic sensors must be employed for target detection, especially at night when visibility will be poor.

(E) If any marine mammals are detected within the AC-130's orbit circle, either during initial clearance or after commencement of live firing, the mission will be immediately halted and relocated as necessary or suspended until the marine mammal has left the area. If relocated to another target area, the clearance procedures described in paragraph (c)(2)(ii) of this section must be repeated.

(F) If multiple firing events occur within the same flight, these clearance procedures must precede each event.

(iii) If no marine mammals are detected, gunnery exercises may begin with the deployment of MK-25 flares into the center of the designated 5-nm target area.

### (3) Operational Mitigation Measures:

(i) Ramp-up air-to-surface gunnery firing activities by beginning with the lowest caliber monition and proceeding to the highest, which means the munitions would be fired in the following order: 25 mm; 40 mm; and 105 mm.

(ii) Air-to-surface gunnery exercises conducted after sunset must use the 105-mm training round instead of the 105-mm full up round.

(iii) One mission per year may be conducted beyond the 200 m isobaths, which is south of a line delineating the shelf break with coordinates of 29°42.73' N, 86°48.27' W and 29°12.73' N, 85°59.88' W

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(Figure 1–12 in Eglin AFB's LOA application). The single mission beyond the shelf break will occur during daylight hours only.

### (4) Post-mission Monitoring:

(i) Aircrews will initiate the post-mission clearance procedures beginning at the operational altitude of approximately 15,000 to 20,000 ft (4572 to 6096 m) elevation, and then initiate a spiraling descent down to an observation altitude of approximately 6,000 ft (1,829 m) elevation. Rates of descent will occur over a 3- to 5-minute time frame.

(ii) If post-detonation surveys determine that an injury or lethal take of a marine mammal has occurred, the test procedure and the monitoring methods must be reviewed with the National Marine Fisheries Service and appropriate changes to avoid unauthorized take must be made, prior to conducting the next air-to-surface gunnery exercise.

## §217.115 Requirements for monitoring and reporting.

(a) The Holder of the Letter of Authorization issued pursuant to §§216.106 and 217.117 of this chapter for activities described in §217.110(c) is required to conduct the monitoring and reporting measures specified in this section and §217.114 and any additional monitoring measures contained in the Letter of Authorization.

(b) The Holder of the Letter of Authorization is required to cooperate with the National Marine Fisheries Service, and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals. Unless specified otherwise in the Letter of Authorization, the Holder of the Letter of Authorization must notify the Director, Office of Protected Resources, National Marine Fisheries Service, or designee, by letter or telephone (301-427-8401), at least 2 weeks prior to any modification to the activity identified in §217.110(c) that has the potential to result in the serious injury, mortality or Level A or Level B harassment of a marine mammal that was not identified and addressed previously.

(c) Monitoring Procedures for PSW Missions:

(1) The Holder of this Authorization must:

(i) Designate qualified on-site individual(s) to record the effects of mission launches on marine mammals that inhabit the northern Gulf of Mexico;

(ii) Have on-site individuals, approved in advance by the National Marine Fisheries Service, to conduct the mitigation, monitoring and reporting activities specified in this subpart and in the Letter of Authorization issued pursuant to §§216.106 and 217.117 of this chapter.

(iii) Conduct aerial surveys to reduce impacts on protected species. The aerial survey/monitoring team will consist of two experienced marine mammal observers, approved in advance by the Southeast Region, National Marine Fisheries Service. The aircraft will also have a data recorder who would be responsible for relaying the location, the species if possible, the direction of movement, and the number of animals sighted.

(iv) Conduct shipboard monitoring to reduce impacts to protected species. Trained observers will conduct monitoring from the highest point possible on each mission or support vessel(s). The observer on the vessel must be equipped with optical equipment with sufficient magnification (e.g., 25x power "Big-Eye" binoculars).

(2) The aerial and shipboard monitoring teams will maintain proper lines of communication to avoid communication deficiencies. The observers from the aerial team and operations vessel will have direct communication with the lead scientist aboard the operations vessel.

(3) Pre-mission Monitoring: Approximately 5 hours prior to the mission, or at daybreak, the appropriate vessel(s) would be on-site in the primary test site near the location of the earliest planned mission point. Observers onboard the vessel will assess the suitability of the test site, based on visual observation of marine mammals and sea turtles, the presence of large Sargassum mats, seabirds and jellyfish aggregations and overall environmental conditions (visibility, sea state, etc.). This information will be relayed to the lead scientist.

(4) Three Hours Prior to Mission:

(i) Approximately three hours prior to the mission launch, aerial monitoring will commence within the test site to evaluate the test site for environmental suitability. Evaluation of the entire test site would take approximately 1 to 1.5 hours. The aerial monitoring team will begin monitoring the safety zone and buffer zone around the target area.

(ii) Shipboard observers will monitor the safety and buffer zone, and the lead scientist will enter all marine mammals and sea turtle sightings, including the time of sighting and the direction of travel, into a marine animal tracking and sighting database.

(5) One to 1.5 Hours Prior to Mission Launch:

(i) Depending upon the mission, aerial and shipboard viewers will be instructed to leave the area and remain outside the safety area. The aerial team will report all marine animals spotted and their directions of travel to the lead scientist onboard the vessel.

(ii) The shipboard monitoring team will continue searching the buffer zone for protected species as it leaves the safety zone. The surface vessels will continue to monitor from outside of the safety area until after impact.

(6) Post-mission monitoring:

(i) The vessels will move into the safety zone from outside the safety zone and continue monitoring for at least two hours, concentrating on the area down current of the test site.

(ii) The holder of the Letter of Authorization will closely coordinate mission launches with marine animal stranding networks.

(iii) The monitoring team will document any dead or injured marine mammals or turtles and, if practicable, recover and examine any dead animals.

(d) Monitoring Procedures for A-S Gunnery Missions:

(1) In addition to the monitoring requirements in 217.114(c), the holder of the Letter of Authorization must:

(i) Cooperate with the National Marine Fisheries Service and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals.

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(ii) Require aircrews to initiate the post-mission clearance procedures beginning at the operational altitude of approximately 15,000 to 20,000 ft (4572 to 6096 m) elevation, and then initiate a spiraling descent down to an observation altitude of approximately 6,000 ft (1,829 m) elevation. Rates of descent will occur over a 3- to 5-minute time frame.

(iii) Track their use of the EGTTR for test firing missions and marine mammal observations, through the use of mission reporting forms.

(iv) Coordinate air-to-surface gunnery exercises with future flight activities to provide supplemental post-mission observations of marine mammals in the operations area of the exercise.

(2) [Reserved]

(e) In accordance with provisions in §217.118(b)(2), the Holder of the Letter of Authorization must conduct the research required under the Letter of Authorization.

(f) Reporting:

(1) Unless specified otherwise in the Letter of Authorization, the Holder of the Letter of Authorization must conduct all of the monitoring and reporting required under the LOA and submit an annual report to the Director, Office of Protected Resources, National Marine Fisheries Service by a date certain specified in the LOA. This report must include the following information:

(i) Date and time of each PSW/air-to-surface gunnery exercise;

(ii) A complete description of the pre-exercise and post-exercise activities related to mitigating and monitoring the effects of PSW/air-to-surface gunnery exercises on marine mammal populations;

(iii) Results of the monitoring program, including numbers by species/stock of any marine mammals noted injured or killed as a result of the training exercises and number of marine mammals (by species if possible) that may have been harassed due to presence within the applicable safety zone;

(iv) A detailed assessment of the effectiveness of sensor-based monitoring in detecting marine mammals in the area of air-to-surface gunnery operations; and

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(v) Results of coordination with coastal marine mammal stranding networks.

(2) The final comprehensive report on all marine mammal monitoring and research conducted during the applicability period of this subpart must be submitted to the Director, Office of Protected Resources, National Marine Fisheries Service at least 240 days prior to expiration of applicability of this subpart or 240 days after the expiration of applicability of this subpart if new regulations will not be requested.

### **§217.116 Applications for Letters of Authorization.**

To incidentally take marine mammals pursuant to this subpart, the U.S. citizen (as defined at §216.103 of this chapter) conducting the activities identified in §217.110(c) must apply for and obtain either an initial Letter of Authorization in accordance with §§216.106 and 217.117 of this chapter or a renewal under §217.118.

### **§217.117 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the species or stock of affected marine mammals.

### **§217.118 Renewals and Modifications of Letters of Authorization.**

(a) A Letter of Authorization issued under §216.106 and §217.117 of this chapter for the activities identified in §217.110(c) will be renewed or modified upon request of the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for this subpart (excluding changes made pursuant to adaptive management) and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous Letter of Authorization under this subpart were implemented.

(b) For Letter of Authorization modifications or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to adaptive management) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of a proposed Letter of Authorization in the FEDERAL REGISTER, including the associate analysis illustrating the change, and solicit public comment before issuing the Letter of Authorization.

(c) A Letter of Authorization issued under §§216.106 and 217.117 of this chapter for the activity identified in §217.110(c) may be modified by NMFS under the following circumstances:

(1) Adaptive Management—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with the U.S. Air Force regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(i) Results from the U.S. Air Force's monitoring from the previous year;

(ii) Results from marine mammal and sound research; or

(iii) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by this subpart or subsequent Letters of Authorization.

(2) Emergencies. If NMFS determines that an emergency exists that poses a significant risk to the well-being of the

species or stocks of marine mammals specified in §217.112(c), a Letter of Authorization issued pursuant to §§216.106 and 217.117 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days subsequent to the action.

### Subparts M–N [Reserved]

## Subpart O—Taking of Marine Mammals Incidental to Operation of Offshore Oil and Gas Facilities in the U.S. Beaufort Sea

SOURCE: 78 FR 75507, Dec. 12, 2013, unless otherwise noted.

EFFECTIVE DATE NOTE: At 78 FR 75507, Dec. 12, 2013, subpart O was added, effective Jan. 13, 2014, through Jan. 14, 2019.

### §217.140 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to BP Exploration (Alaska) Inc. (BP) and those persons it authorizes to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occurs incidental to operation of offshore oil and gas facilities in the U.S. Beaufort Sea, Alaska, in the Northstar Development Area.

(b) The taking of marine mammals by BP may be authorized in a Letter of Authorization only if it occurs in the geographic region that encompasses the Northstar Oil and Gas Development area within state and/or Federal waters in the U.S. Beaufort Sea.

### §217.141 Effective dates.

Regulations in this subpart are effective from January 13, 2014 through January 14, 2019.

### §217.142 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§216.106 and 217.148 of this chapter, the Holder of the Letter of Authorization (hereinafter “BP”) may incidentally, but not intentionally, take marine mammals within

## § 217.143

the area described in § 217.140(b), provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate Letter of Authorization.

(b) The activities identified in § 217.140(a) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 217.140(a) is limited to the following species and by the indicated method and amount of take:

(1) Level B Harassment:

(i) Cetaceans:

(A) Bowhead whale (*Balaena mysticetus*)—75 (an average of 15 annually)

(B) Gray whale (*Eschrichtius robustus*)—10 (an average of 2 annually)

(C) Beluga whale (*Delphinapterus leucas*)—100 (an average of 20 annually)

(ii) Pinnipeds:

(A) Ringed seal (*Phoca hispida*)—155 (an average of 31 annually)

(B) Bearded seal (*Erignathus barbatus*)—25 (an average of 5 annually)

(C) Spotted seal (*Phoca largha*)—25 (an average of 5 annually)

(2) Level A Harassment and Mortality: Ringed seal—25 (an average of 5 annually)

## § 217.143 Prohibitions.

Notwithstanding takings contemplated in § 217.140 and authorized by a Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter, no person in connection with the activities described in § 217.140 may:

(a) Take any marine mammal not specified in § 217.142(c);

(b) Take any marine mammal specified in § 217.142(c) other than by incidental take as specified in § 217.142(c)(1) and (c)(2);

(c) Take a marine mammal specified in § 217.172(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal;

(d) Take a marine mammal specified in § 217.172(c) if such taking results in an unmitigable adverse impact on the species or stock for taking for subsistence uses; or

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(e) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter.

## § 217.144 Mitigation.

(a) When conducting the activities identified in § 217.140(a), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter must be implemented. These mitigation measures include but are not limited to:

(1) Ice-covered Season:

(i) In order to reduce the taking of ringed seals to the lowest level practicable, BP must begin winter construction activities, principally ice roads, as soon as possible once weather and ice conditions permit such activity.

(ii) Any ice roads or other construction activities that are initiated after March 1, in previously undisturbed areas in waters deeper than 10 ft (3 m), must be surveyed, using trained dogs in order to identify and avoid ringed seal structures by a minimum of 492 ft (150 m).

(iii) After March 1 of each year, activities should avoid, to the greatest extent practicable, disturbance of any located seal structure.

(2) Open-water Season:

(i) BP will establish and monitor, during all daylight hours, a 190 dB re 1 µPa (rms) exclusion zone for seals around the island for all activities with sound pressure levels (SPLs) that are expected to exceed that level in waters beyond the Northstar facility on Seal Island.

(ii) BP will establish and monitor, during all daylight hours, a 180 dB re 1 µPa (rms) exclusion zone for cetaceans around the island for all activities with SPLs that are expected to exceed that level in waters beyond the Northstar facility at Seal Island.

(iii) If any marine mammals are observed within the relevant exclusion zone, described in § 217.144(a)(2)(i) or (a)(2)(ii), the activity creating the noise will shutdown or reduce its SPL sufficiently (*i.e.*, power down) to ensure that received SPLs do not exceed those prescribed SPL intensities at the affected marine mammal. The shutdown

or reduced SPL shall be maintained until such time as the observed marine mammal(s) has been seen to have left the applicable exclusion zone or until 15 minutes have elapsed in the case of a pinniped or odontocete or 30 minutes in the case of a mysticete without re-sighting, whichever occurs sooner.

(iv) The entire exclusion zones prescribed in §217.144(a)(2)(i) or (a)(2)(ii) must be visible during the entire 30-minute pre-activity monitoring time period in order for the activity to begin.

(v) BP shall employ a ramp-up technique at the beginning of each day's in-water pile driving activities and if pile driving resumes after it has ceased for more than 1 hour.

(A) If a vibratory driver is used, BP is required to initiate sound from vibratory hammers for 15 seconds at reduced energy followed by a 1-minute waiting period. The procedure shall be repeated two additional times before full energy may be achieved.

(B) If a non-diesel impact hammer is used, BP is required to provide an initial set of strikes from the impact hammer at reduced energy, followed by a 1-minute waiting period, then two subsequent sets.

(C) If a diesel impact hammer is used, BP is required to turn on the sound attenuation device for 15 seconds prior to initiating pile driving.

(vi) New drilling into oil-bearing strata shall not take place during either open-water or spring-time broken ice conditions.

(vii) All non-essential boats, barge, and air traffic will be scheduled to avoid periods when bowhead whales are migrating through the area where they may be affected by noise from these activities.

(3) Helicopter flights to support Northstar activities must be limited to a corridor from Seal Island to the mainland, and, except when limited by weather or personnel safety, must maintain a minimum altitude of 1,000 ft (305 m), except during takeoff and landing.

(4) Additional mitigation measures as contained in a Letter of Authorization issued under §§216.106 and 217.148 of this chapter.

(b) [Reserved]

#### **§217.145 Measures to ensure availability of species for subsistence uses.**

When applying for a Letter of Authorization pursuant to §217.147 or a renewal of a Letter of Authorization pursuant to §217.149, BP must submit a Plan of Cooperation that identifies what measures have been taken and/or will be taken to minimize any adverse effects on the availability of marine mammal species or stocks for taking for subsistence uses. A plan shall include the following:

(a) A statement that the applicant has notified and met with the affected subsistence communities to discuss proposed activities and to resolve potential conflicts regarding timing and methods of operation;

(b) A description of what measures BP has taken and/or will take to ensure that the proposed activities will not interfere with subsistence whaling or sealing; and

(c) What plans BP has to continue to meet with the affected communities to notify the communities of any changes in operation.

#### **§217.146 Requirements for monitoring and reporting.**

(a) BP must notify the Alaska Regional Office, NMFS, within 48 hours of starting ice road construction, cessation of ice road usage, and the commencement of icebreaking activities for the Northstar facility.

(b) BP must designate qualified, on-site individuals, approved in advance by NMFS, to conduct the mitigation, monitoring, and reporting activities specified in the Letter of Authorization issued under §§216.106 and 217.148 of this chapter.

(c) Monitoring measures during the ice-covered season shall include, but are not limited to, the following:

(1) After March 1, trained dogs must be used to detect seal lairs in previously undisturbed areas that may be potentially affected by on-ice construction activity, if any. Surveys for seal structures should be conducted to a minimum distance of 492 ft (150 m) from the outer edges of any disturbance.



(2) If ice road construction occurs after March 1, conduct a follow-up assessment in May of that year of the fate of all seal structures located during monitoring conducted under paragraph (c)(1) of this section near the physically disturbed areas.

(3) BP shall conduct acoustic measurements to document sound levels, characteristics, and transmissions of airborne sounds with expected source levels of 90 dBA or greater created by on-ice activity at Northstar that have not been measured in previous years. In addition, BP shall conduct acoustic measurements to document sound levels, characteristics, and transmissions of airborne sounds for sources on Northstar Island with expected received levels at the water's edge that exceed 90 dBA that have not been measured in previous years.

(d) Monitoring measures during the open-water season shall include, but are not limited to, the following:

(1) Acoustic monitoring of the bowhead whale migration.

(2) BP shall monitor the exclusion zones of activities capable of producing pulsed underwater sound with levels  $\geq 180$  or  $\geq 190$  dB re 1  $\mu$ Pa (rms) at locations where cetaceans or seals could be exposed. At least one on-island observer shall be stationed at a location providing an unobstructed view of the predicted exclusion zone. The observer(s) shall scan the exclusion zone continuously for marine mammals for 30 minutes prior to the operation of the sound source. Observations shall continue during all periods of operation and for 30 minutes after the cessation of the activity. The observer shall record the: species and numbers of marine mammals seen within the 180 or 190 dB zones; bearing and distance of the marine mammals from the observation point; and behavior of marine mammals and any indication of disturbance reactions to the monitored activity.

(e) BP shall conduct any additional monitoring measures contained in a Letter of Authorization issued under §§216.106 and 217.148 of this chapter.

(f) BP shall submit an annual report to NMFS within the time period specified in a Letter of Authorization issued

under §§216.106 and 217.148 of this chapter.

(g) If specific mitigation and monitoring are required for activities on the sea ice initiated after March 1 (requiring searches with dogs for lairs), during the operation of strong sound sources (requiring visual observations and shutdown procedures), or for the use of new sound sources that have not previously been measured, then a preliminary summary of the activity, method of monitoring, and preliminary results shall be submitted to NMFS within 90 days after the cessation of that activity. The complete description of methods, results, and discussion shall be submitted as part of the annual report described in paragraph (f) of this section.

(h) BP shall submit a draft comprehensive report to NMFS, Office of Protected Resources, and NMFS, Alaska Regional Office (specific contact information to be provided in Letter of Authorization), no later than 240 days prior to the expiration of the regulations in this subpart. This comprehensive technical report shall provide full documentation of methods, results, and interpretation of all monitoring during the first four and a quarter years of the LOA. Before acceptance by NMFS as a final comprehensive report, the draft comprehensive report shall be subject to review and modification by NMFS scientists.

(i)(1) In the unanticipated event that Northstar operations clearly causes the death of more than five ringed seals annually or the take of a marine mammal in a manner prohibited by this final rule, such as an injury (Level A harassment), serious injury or mortality (e.g., ship-strike, gear interaction), BP shall immediately take steps to cease the operations that caused the unauthorized take and report the incident as soon as practicable and no later than 24 hours after the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, or his designee, the Alaska Regional Office, and the Alaska Regional Stranding Coordinators (specific contact information to be provided in Letter of Authorization). The report must include the following information:

- (i) Time, date, and location (latitude/longitude) of the incident;
- (ii) The type of equipment involved in the incident;
- (iii) Description of the incident;
- (iv) Water depth, if relevant;
- (v) Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- (vi) Species identification or description of the animal(s) involved;
- (vii) The fate of the animal(s); and
- (viii) Photographs or video footage of the animal (if equipment is available).

(2) Activities shall not resume until NMFS is able to review the circumstances causing the exceedance of the authorized take. NMFS will work with BP to identify additional measures to minimize the likelihood that more than five ringed seals will not be killed each year (or other marine mammal species that may have been injured, seriously injured, or killed) from BP's activities. BP may not resume their activities until notified by NMFS via letter, email, or telephone.

(3) In the event that BP discovers an injured or dead marine mammal, and it is determined that the cause of the injury or death is unknown and the death is relatively recent (*i.e.*, in less than a moderate state of decomposition as described in the next paragraph), BP will report the incident/discovery as soon as practicable and no later than 24 hours after the incident/discovery to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, by phone or email, the Alaska Regional Office, and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinators (specific contact information to be provided in Letter of Authorization). The report must include the same information identified in §217.146(i)(1). Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with BP to determine whether modifications in the activities are appropriate.

(4) In the event that BP discovers an injured or dead marine mammal, and it is determined that the injury or death is not associated with or related to the activities authorized in this final rule (e.g., previously wounded animal, car-

cass with moderate to advanced decomposition, or scavenger damage), BP shall report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, by phone or email and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinators (specific contact information to be provided in Letter of Authorization), as soon as practicable and no later than 24 hours after the discovery. BP shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. Activities may continue while NMFS reviews the circumstances of the incident.

#### **§217.147 Applications for Letters of Authorization.**

(a) To incidentally take marine mammals pursuant to these regulations, the U.S. Citizen (as defined by §216.103 of this chapter) conducting the activity identified in §217.140(a) (*i.e.*, BP) must apply for and obtain either an initial Letter of Authorization in accordance with §217.148 or a renewal under §217.149.

(b) [Reserved]

#### **§217.148 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, shall be valid for a period of time not to exceed the period of validity of this subpart.

(b) The Letter of Authorization shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (*i.e.*, mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization shall be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s) and will not have an unmitigable adverse impact on the availability of species or

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stocks of marine mammals for taking for subsistence uses.

### **§217.149 Renewal of Letters of Authorization and adaptive management.**

(a) A Letter of Authorization issued under §216.106 and §217.148 of this chapter for the activity identified in §217.140(a) shall be renewed upon request by the applicant or determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations, provided that:

(1) NMFS is notified that the activity described in the application submitted under §217.147 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) NMFS receives the monitoring reports required under §217.146(f) and (g); and

(3) NMFS determines that the mitigation, monitoring and reporting measures required under §§217.144 and 217.146 and the Letter of Authorization issued under §§216.106 and 217.148 of this chapter were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization.

(b) If either a request for a renewal of a Letter of Authorization issued under §§216.106 and 217.149 of this chapter or a determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations indicates that a substantial modification, as determined by NMFS, to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed substantive changes to the mitigation and monitoring requirements contained in these regulations

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or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER.

(d) *Adaptive management*—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with BP regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from BP's monitoring from the previous year;

(2) Results from general marine mammal and sound research; or

(3) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

### **§217.150 Modifications of Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization issued by NMFS, pursuant to §§216.106 and 217.148 of this chapter and subject to the provisions of this subpart, shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under §217.149, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in §217.142(c), a Letter of Authorization issued pursuant to §§216.106 and 217.148 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days subsequent to the action.

**Subpart P—Taking Marine Mammals Incidental to Construction and Operation of a Liquefied Natural Gas Deepwater Port in the Gulf of Mexico**

SOURCE: 78 FR 20816, Apr. 8, 2013, unless otherwise noted.

EFFECTIVE DATE NOTE: At 78 FR 20816, Apr. 8, 2013, subpart P was added, effective June 1, 2013, to May 31, 2018.

**§ 217.151 Specified activity and specified geographical region.**

(a) Regulations in this subpart apply only to Port Dolphin Energy LLC (Port Dolphin) and those persons it authorizes to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to construction and operation of the Port Dolphin Deepwater Port (Port).

(b) The taking of marine mammals by Port Dolphin may be authorized in a Letter of Authorization (LOA) only if it occurs in the vicinity of the Port Dolphin Deepwater Port in the eastern Gulf of Mexico or along the associated pipeline route.

**§ 217.152 Effective dates.**

Regulations in this subpart are effective from June 1, 2013, through May 31, 2018.

**§ 217.153 Permissible methods of taking.**

(a) Under LOAs issued pursuant to §§ 216.106 and 217.157 of this chapter, the Holder of the LOA (hereinafter “Port Dolphin”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.151(b) of this chapter, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

(b) The incidental take of marine mammals under the activities identified in § 217.151(a) of this chapter is limited to the following species and is limited to Level B Harassment:

(1) Bottlenose dolphin (*Tursiops truncatus*)—3,388 (860 the first year and an average of 632 annually thereafter)

(2) Atlantic spotted dolphin (*Stenella frontalis*)—1,274 (290 the first year and an average of 246 annually thereafter)

**§ 217.154 Prohibitions.**

Notwithstanding takings contemplated in § 217.151 of this chapter and authorized by a LOA issued under §§ 216.106 and 217.157 of this chapter, no person in connection with the activities described in § 217.151 of this chapter may:

(a) Take any marine mammal not specified in § 217.153(b) of this chapter;

(b) Take any marine mammal specified in § 217.153(b) of this chapter other than by incidental, unintentional Level B Harassment;

(c) Take a marine mammal specified in § 217.153(b) of this chapter if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under §§ 216.106 and 217.157 of this chapter.

**§ 217.155 Mitigation.**

(a) When conducting the activities identified in § 217.151(a) of this chapter, the mitigation measures contained in any LOA issued under §§ 216.106 and 217.157 of this chapter must be implemented. These mitigation measures include but are not limited to:

(1) General Conditions:

(i) Briefings shall be conducted between the Port Dolphin project construction supervisors and the crew, protected species observer(s) (PSO), and acoustic monitoring team prior to the start of all construction activity, and when new personnel join the work, to explain responsibilities, communication procedures, protected species monitoring protocol, and operational procedures.

(ii) Port Dolphin shall comply with all applicable equipment sound standards and ensure that all construction equipment has sound control devices no less effective than those provided on the original equipment. Vessel crew and contractors shall minimize the

production of underwater sound to the extent possible. Equipment and/or procedures used may include the use of enclosures and mufflers on equipment, minimizing the use of thrusters, and turning off engines and equipment when not in use.

(iii) All vessels associated with Port Dolphin construction and operations shall comply with NMFS Vessel Strike Avoidance Measures and Reporting for Mariners and applicable regulations. All vessels associated with Port Dolphin construction and operations shall remain 500 yd (457 m) away from North Atlantic right whales (*Eubalaena glacialis*) and 100 yd (91 m) away from all other marine mammals, except in cases where small marine mammals (i.e., delphinids) voluntarily approach within 100 yd or unless constrained by human safety concerns or navigational constraints.

(2) Shutdown and Monitoring:

(i) Shutdown zone: For all stationary activities, shutdown zones shall be established. These zones shall include all areas where underwater sound pressure levels (SPLs) are anticipated to equal or exceed 180 dB re: 1  $\mu$ Pa rms, as determined by modeled scenarios approved by NMFS for each specific activity. The actual size of these zones shall be empirically determined and reported by Port Dolphin. For all non-stationary activities (e.g., pipeline burial, shuttle regasification vessel (SRV) maneuvering), Port Dolphin shall adhere to Vessel Strike Avoidance Measures described in §217.155(a)(1)(iii) of this chapter, but shall not otherwise be required to establish shutdown zones.

(ii) Disturbance zone: For all construction activities, disturbance zones shall be established. For impact pile driving, these zones shall include all areas where underwater SPLs are anticipated to equal or exceed 160 dB re: 1  $\mu$ Pa rms. For all other activities these zones shall include all areas where underwater SPLs are anticipated to equal or exceed 120 dB re: 1  $\mu$ Pa rms. These zones shall be established on the basis of modeled scenarios approved by NMFS for each specific activity. The actual size of disturbance zones shall be empirically determined and reported by Port Dolphin, and on-site PSOs shall be aware of the size of these

zones. However, because of the large size of these zones, monitoring of the zone is required only to maximum line-of-sight distance from established monitoring locations.

(iii) Visual monitoring shall occur for all construction activities. The following measures shall apply:

(A) Zones shall be monitored from the appropriate vessel or work platform, or other suitable vantage point. Port Dolphin shall at all times employ, at minimum, two PSOs in association with each concurrent specified construction activity.

(B) Shutdown zones shall be monitored for the presence of marine mammals before, during, and after construction activity. For all activities, the shutdown zone shall be monitored for 30 minutes prior to initiating the start of activity and for 30 minutes following the completion of activity. If marine mammals are present within the shutdown zone prior to initiating activity, the start shall be delayed until the animals leave the shutdown zone of their own volition or until 15 minutes has elapsed without observing the animal. If a marine mammal is observed within or approaching the shutdown zone, activity shall be halted as soon as it is safe to do so, until the animal is observed exiting the shutdown zone or 15 minutes has elapsed. If a marine mammal is observed within the disturbance zone, a take shall be recorded and behaviors documented.

(C) PSOs shall be on watch at all times during daylight hours when in-water operations are being conducted, unless conditions (e.g., fog, rain, darkness) make observations impossible. The lead PSO on duty shall make this determination. If conditions deteriorate during daylight hours such that the sea surface observations are halted, visual observations must resume as soon as conditions permit. While activities will be permitted to continue during low-visibility conditions, they must have been initiated following proper clearance of the shutdown zone under acceptable observation conditions and must be restarted, if halted for any reason, using the appropriate shutdown zone clearance procedures as described in §217.155(a)(2)(iii)(B) of this chapter.

## (3) Pile driving:

(i) A minimum shutdown zone of 250 m radius shall be established around all impact pile driving activity.

(ii) Contractors shall reduce the power of impact hammers to minimum energy levels required to drive a pile.

(iii) Port Dolphin shall use a sound attenuation measure for impact driving of pilings. Prior to beginning construction, Port Dolphin must provide information to NMFS about the device to be used, including technical specifications. NMFS must approve use of the device before construction may begin. If a bubble curtain or similar measure is used, it shall distribute small air bubbles around 100 percent of the piling perimeter for the full depth of the water column. Any other attenuation measure (e.g., temporary sound attenuation pile) must provide 100 percent coverage in the water column for the full depth of the pile. Prior to any impact pile driving, a performance test of the sound attenuation device must be conducted in accordance with a NMFS-approved acoustic monitoring plan. If a bubble curtain or similar measure is utilized, the performance test shall confirm the calculated pressures and flow rates at each manifold ring.

## (iv) Ramp-up:

(A) A ramp-up technique shall be used at the beginning of each day's in-water pile driving activities and if pile driving resumes after it has ceased for more than 1 hour.

(B) If a vibratory driver is used, contractors shall be required to initiate sound from vibratory hammers for 15 seconds at reduced energy followed by a 1-minute waiting period. The procedure shall be repeated two additional times before full energy may be achieved.

(C) If a non-diesel impact hammer is used, contractors shall be required to provide an initial set of strikes from the impact hammer at reduced energy, followed by a 1-minute waiting period, then two subsequent sets.

(D) If a diesel impact hammer is used, contractors shall be required to turn on the sound attenuation device for 15 seconds prior to initiating pile driving.

(v) No impact pile driving shall occur when visibility in the shutdown zone is significantly limited, such as during heavy rain or fog.

## (4) Additional mitigation measures:

(i) Use of lights during construction activities shall be limited to areas where work is actually occurring, and all other lights must be extinguished. Lights must be shielded such that they illuminate the deck and do not intentionally illuminate surrounding waters, to the extent possible.

(ii) Additional mitigation measures as contained in a LOA issued under §§216.106 and 217.157 of this chapter.

## (b) [Reserved]

**§217.156 Requirements for monitoring and reporting.**

## (a) Visual monitoring program:

(1) Port Dolphin shall employ, at minimum, two qualified PSOs during specified construction-related activities at each site where such activities are occurring. All PSOs must be selected in conformance with NMFS' minimum qualifications, as described in the preamble to this rule, and must receive training sponsored by Port Dolphin, with topics to include, at minimum, implementation of the monitoring protocol, identification of marine mammals, and reporting requirements. The PSOs shall be responsible for visually locating marine mammals in the shutdown and disturbance zones and, to the extent possible, identifying the species. PSOs shall record, at minimum, the following information:

(i) A count of all marine mammals observed by species, sex, and age class, when possible.

(ii) Their location within the shutdown or disturbance zone, and their reaction (if any) to construction activities, including direction of movement.

(iii) Activity that is occurring at the time of observation, including time that activity begins and ends, any acoustic or visual disturbance, and time of the observation.

(iv) Environmental conditions, including wind speed, wind direction, visibility, and temperature.

(2) Port Dolphin shall sponsor a training course to designated crew members assigned to vessels associated with construction activities or support

of operations who will have responsibilities for watching for marine mammals. This course shall cover topics including, but not limited to, descriptions of the marine mammals found in the area, mitigation and monitoring requirements contained in a LOA, sighting log requirements, provisions of NMFS Vessel Strike Avoidance Measures and Reporting for Mariners, and procedures for reporting injured or dead marine mammals.

(3) Monitoring shall be conducted using appropriate binoculars, such as 8x50 marine binoculars. When possible, digital video or still cameras shall also be used to document the behavior and response of marine mammals to construction activities or other disturbances.

(4) Each PSO shall have two-way communication capability for contact with other PSOs or work crews. PSOs shall implement shut-down or delay procedures when applicable by calling for the shut-down to the equipment/vessel operator.

(5) A GPS unit and/or appropriate range finding device shall be used for determining the observation location and distance to marine mammals, vessels, and construction equipment.

(b) Acoustic monitoring program:

(1) Acoustic monitoring must be conducted in accordance with the NMFS-approved acoustic monitoring plan.

(2) Port Dolphin shall provide NMFS with empirically measured source level data for designated sources of sound associated with Port construction and operation activities and shall verify distances to relevant sound thresholds. Measurements shall be carefully coordinated with sound-producing activities.

(3) [Reserved]

(c) Reporting—Port Dolphin must implement the following reporting requirements:

(1) A report of data collected during monitoring shall be submitted to NMFS following conclusion of construction activities. Subsequent reports concerning Port operations shall be submitted annually. The reports shall include:

(i) All data required to be collected during monitoring, as described under §217.156(a) of this chapter, including

observation dates, times, and conditions;

(ii) Correlations of observed behavior with activity type and received levels of sound, to the extent possible; and

(iii) Estimations of total incidental take of marine mammals, extrapolated from observed incidental take.

(2) Port Dolphin shall also submit a report(s) concerning the results of all acoustic monitoring. Acoustic monitoring reports shall include information as described in a NMFS-approved acoustic monitoring plan.

(3) Reporting injured or dead marine mammals:

(i) In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by a LOA (if issued), such as an injury (Level A harassment), serious injury, or mortality, Port Dolphin shall immediately cease the specified activities and report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Southeast Regional Stranding Coordinator, NMFS. The report must include the following information:

(A) Time and date of the incident;

(B) Description of the incident;

(C) Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);

(D) Description of all marine mammal observations in the 24 hours preceding the incident;

(E) Species identification or description of the animal(s) involved;

(F) Fate of the animal(s); and

(G) Photographs or video footage of the animal(s).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with Port Dolphin to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. Port Dolphin may not resume their activities until notified by NMFS.

(ii) In the event that Port Dolphin discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (e.g., in less than a moderate state

of decomposition), Port Dolphin shall immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Southeast Regional Stranding Coordinator, NMFS. The report must include the same information identified in §217.156(b)(3)(i) of this chapter. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with Port Dolphin to determine whether additional mitigation measures or modifications to the activities are appropriate.

(iii) In the event that Port Dolphin discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the LOA (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), Port Dolphin shall report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Southeast Regional Stranding Coordinator, NMFS, within 24 hours of the discovery. Port Dolphin shall provide photographs or video footage or other documentation of the stranded animal sighting to NMFS.

(4) *Annual reports.* (i) A report summarizing all marine mammal monitoring and construction activities shall be submitted to NMFS, Office of Protected Resources, and NMFS, Southeast Regional Office (specific contact information to be provided in LOA) following the conclusion of construction activities. Thereafter, Port Dolphin shall submit annual reports summarizing operations activities.

(ii) The annual reports shall include data collected for each marine mammal species observed in the project area. Description of marine mammal behavior, overall numbers of individuals observed, frequency of observation, and any behavioral changes and the context of the changes relative to activities shall also be included in the reports. Additional information that shall be recorded during activities and contained in the reports include: date and time of marine mammal detections, weather conditions, species identification, approximate distance from

the source, and activity at the construction site when a marine mammal is sighted. Port Dolphin shall extrapolate observed incidences of take to provide an estimate of actual incidences of take.

(5) *Five-year comprehensive report.* (i) Port Dolphin shall submit a draft comprehensive final report to NMFS, Office of Protected Resources, and NMFS, Southeast Regional Office (specific contact information to be provided in LOA) 180 days prior to the expiration of the regulations. This comprehensive technical report shall provide full documentation of methods, results, and interpretation of all monitoring during the first 4.5 years of the activities conducted under the regulations in this subpart.

(ii) Port Dolphin shall submit a revised final comprehensive technical report, including all monitoring results during the entire period of the LOAs, 90 days after the end of the period of effectiveness of the regulations to NMFS, Office of Protected Resources, and NMFS, Southeast Regional Office (specific contact information to be provided in LOA).

#### §217.157 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, Port Dolphin must apply for and obtain a LOA.

(b) A LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, Port Dolphin must apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, Port Dolphin must apply for and obtain a modification of the LOA as described in §217.158 of this chapter.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.*, mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and



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(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of a LOA shall be published in the FEDERAL REGISTER within 30 days of a determination.

### § 217.158 Renewals and modifications of Letters of Authorization.

(a) A LOA issued under §§ 216.106 and 217.157 of this chapter for the activity identified in § 217.151(a) of this chapter shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in § 217.158(c)(1) of this chapter).

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in § 217.158(c)(1) of this chapter) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) A LOA issued under §§ 216.106 and 217.157 of this chapter for the activity identified in § 217.151(a) of this chapter may be modified by NMFS under the following circumstances:

(1) Adaptive Management—NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with Port Dolphin regarding the practicability of the modifications) if doing

so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from Port Dolphin's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) Emergencies—If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.153(b) of this chapter, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the FEDERAL REGISTER within 30 days of the action.

### Subpart Q [Reserved]

### Subpart R—Taking of Marine Mammals Incidental to Operation and Maintenance of the Neptune Liquefied Natural Gas Facility Off Massachusetts

SOURCE: 76 FR 34172, June 13, 2011, unless otherwise noted.

EFFECTIVE DATE NOTE: At 76 FR 34172, June 13, 2011, subpart R was added, effective July 11, 2011, through July 10, 2016.

### § 217.170 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to Neptune LNG LLC (Neptune) and those persons it authorizes to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of

this section and that occur incidental to commissioning and operation, including maintenance and repair activities, at the Neptune Deepwater Port (Port).

(b) The taking of marine mammals by Neptune may be authorized in a Letter of Authorization only if it occurs at the Neptune Deepwater Port within Outer Continental Shelf blocks NK 19-04 6525 and NK 19-04 6575, which are located at approximately 42°28'09" N. lat and 70°36'22" W. long.

#### §217.171 Effective dates.

Regulations in this subpart are effective from July 11, 2011, through July 10, 2016.

[76 FR 35996, June 21, 2011]

#### §217.172 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§216.106 and 217.177 of this chapter, the Holder of the Letter of Authorization (hereinafter "Neptune") may incidentally, but not intentionally, take marine mammals within the area described in §217.170(b), provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate Letter of Authorization.

(b) The incidental take of marine mammals under the activities identified in §217.170(a) is limited to the following species and is limited to Level B Harassment:

##### (1) Mysticetes:

(i) North Atlantic right whale (*Eubalaena glacialis*)—120 (an average of 24 annually).

(ii) Fin whale (*Balaenoptera physalus*)—145 (an average of 29 annually).

(iii) Humpback whale (*Megaptera novaeangliae*)—390 (an average of 78 annually).

(iv) Minke whale (*Balaenoptera acutorostrata*)—90 (an average of 18 annually).

(v) Sei whale (*Balaenoptera borealis*)—60 (an average of 12 annually).

##### (2) Odontocetes:

(i) Long-finned pilot whale (*Globicephala melas*)—595 (an average of 119 annually).

(ii) Atlantic white-sided dolphin (*Lagenorhynchus acutus*)—1,935 (an average of 387 annually).

(iii) Bottlenose dolphin (*Tursiops truncatus*)—50 (an average of 10 annually).

(iv) Common dolphin (*Delphinus delphis*)—100 (an average of 20 annually).

(v) Risso's dolphin (*Grampus griseus*)—100 (an average of 20 annually).

(vi) Killer whale (*Orcinus orca*)—100 (an average of 20 annually).

(vii) Harbor porpoise (*Phocoena phocoena*)—25 (an average of 5 annually).

##### (3) Pinnipeds:

(i) Harbor seal (*Phoca vitulina*)—75 (an average of 15 annually).

(ii) Gray seal (*Halichoerus grypus*)—75 (an average of 15 annually).

#### §217.173 Prohibitions.

Notwithstanding takings contemplated in §217.170 and authorized by a Letter of Authorization issued under §§216.106 and 217.177 of this chapter, no person in connection with the activities described in §217.170 may:

(a) Take any marine mammal not specified in §217.172(b);

(b) Take any marine mammal specified in §217.172(b) other than by incidental, unintentional Level B Harassment;

(c) Take a marine mammal specified in §217.172(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under §§216.106 and 217.177 of this chapter.

#### §217.174 Mitigation.

(a) When conducting the activities identified in §217.170(a), the mitigation measures contained in the Letter of Authorization issued under §§216.106 and 217.177 must be implemented. These mitigation measures include but are not limited to:

(1) Major Repairs (May 1–November 30):

(i) During repairs, if a marine mammal is detected within 0.6 mi (1 km) of the repair vessel (or acoustically), the

vessel superintendent or on-deck supervisor shall be notified immediately. The vessel's crew will be put on a heightened state of alert. The marine mammal will be monitored constantly to determine if it is moving toward the repair area.

(ii) Repair vessels shall cease any movement in the area if a marine mammal other than a right whale is sighted within or approaching to a distance of 100 yd (91 m) from the operating repair vessel. Repair vessels shall cease any movement in the construction area if a right whale is sighted within or approaching to a distance of 500 yd (457 m) from the operating vessel. Vessels transiting the repair area, such as pipe haul barge tugs, shall also be required to maintain these separation distances.

(iii) Repair vessels shall cease all sound emitting activities if a marine mammal other than a right whale is sighted within or approaching to a distance of 100 yd (91 m) or if a right whale is sighted within or approaching to a distance of 500 yd (457 m), from the operating repair vessel. The back-calculated source level, based on the most conservative cylindrical model of acoustic energy spreading, is estimated to be 139 dB re 1  $\mu$ Pa.

(iv) Repair activities may resume after the marine mammal is positively reconfirmed outside the established zones (either 500 yd (457 m) or 100 yd (91 m), depending upon species) or if the marine mammal has not been re-sighted in the established zones for 30 minutes.

(v) While under way, all repair vessels shall remain 500 yd (457 m) away from right whales and 100 yd (91 m) away from all other marine mammals, unless constrained by human safety concerns or navigational constraints.

(vi) All repair vessels 300 gross tons or greater must maintain a speed of 10 knots (18.5 km/hr) or less. Vessels less than 300 gross tons carrying supplies or crew between the shore and the repair site must contact the Mandatory Ship Reporting System, the U.S. Coast Guard (USCG), or the protected species observers (PSOs) at the repair site before leaving shore for reports of recent right whale sightings or active Dynamic Management Areas (DMAs) and,

consistent with navigation safety, restrict speeds to 10 knots (18.5 km/hr) or less within 5 mi (8 km) of any recent sighting location and within any existing DMA.

(vii) Vessels transiting through the Cape Cod Canal and Cape Cod Bay (CCB) between January 1 and May 15 must reduce speeds to 10 knots (18.5 km/hr) or less, follow the recommended routes charted by NOAA to reduce interactions between right whales and shipping traffic, and avoid aggregations of right whales in the eastern portion of CCB.

(2) Major Repairs (December 1–April 30): If unplanned/emergency repair activities cannot be conducted between May 1 and November 30, then Neptune shall implement the following mitigation measures in addition to those listed in §217.174(a)(1)(i) through (vii):

(i) If on-board PSOs do not have at least 0.6-mi (1-km) visibility, they shall call for a shutdown of repair activities. If dive operations are in progress, then they shall be halted and divers brought on board until visibility is adequate to see a 0.6-mi (1-km) range. At the time of shutdown, the use of thrusters must be minimized to the lowest level needed to maintain personnel safety. If there are potential safety problems due to the shutdown, the captain must decide what operations can safely be shut down and shall document such activities in the data log.

(ii) Prior to leaving the dock to begin transit, the barge must contact one of the PSOs on watch to receive an update of sightings within the visual observation area. If the PSO has observed a North Atlantic right whale within 30 minutes of the transit start, the vessel shall hold for 30 minutes and again seek clearance to leave from the PSOs on board. PSOs will assess whale activity and visual observation ability at the time of the transit request to clear the barge for release and will grant clearance if no North Atlantic right whales have been sighted in the last 30 minutes in the visual observation area.

(iii) Neptune or its contractor shall provide a half-day training course to designated crew members assigned to the transit barges and other support vessels who will have responsibilities for watching for marine mammals.

This course shall cover topics including, but not limited to, descriptions of the marine mammals found in the area, mitigation and monitoring requirements contained in the Letter of Authorization, sighting log requirements, and procedures for reporting injured or dead marine mammals. These designated crew members shall be required to keep watch on the bridge and immediately notify the navigator of any whale sightings. All watch crew members shall sign into a bridge log book upon start and end of watch. Transit route, destination, sea conditions, and any protected species sightings/mitigation actions during watch shall be recorded in the log book. Any whale sightings within 3,281 ft (1,000 m) of the vessel shall result in a high alert and slow speed of 4 knots (7.4 km/hr) or less. A sighting within 2,461 ft (750 m) shall result in idle speed and/or ceasing all movement.

(iv) The material barges and tugs used for repair work shall transit from the operations dock to the work sites during daylight hours, when possible, provided the safety of the vessels is not compromised. Should transit at night be required, the maximum speed of the tug shall be 5 knots (9.3 km/hr).

(v) Consistent with navigation safety, all repair vessels must maintain a speed of 10 knots (18.5 km/hr) or less during daylight hours. All vessels shall operate at 5 knots (9.3 km/hr) or less at all times within 3.1 mi (5 km) of the repair area.

(3) Speed Restrictions in Seasonal Management Areas (SMAs): Repair vessels and shuttle regasification vessels (SRVs) shall transit at 10 knots (18.5 km/hr) or less in the following seasons and areas, which either correspond to or are more restrictive than the times and areas in NMFS' regulations at 50 CFR 224.105 that implement speed restrictions to reduce the likelihood and severity of ship strikes of right whales:

(i) CCB SMA from January 1 through May 15, which includes all waters in CCB, extending to all shorelines of the Bay, with a northern boundary of 42°12' N. latitude;

(ii) Off Race Point SMA year round, which is bounded by straight lines connecting the following coordinates in the order stated: 42°30' N. 69°45' W.;

thence to 42°30' N. 70°30' W.; thence to 42°12' N. 70°30' W.; thence to 42°12' N. 70°12' W.; thence to 42°04'56.5" N. 70°12' W.; thence along mean high water line and inshore limits of COLREGS limit to a latitude of 41°40' N.; thence due east to 41°41' N. 69°45' W.; thence back to starting point; and

(iii) Great South Channel (GSC) SMA from April 1 through July 31, which is bounded by straight lines connecting the following coordinates in the order stated:

(A) 42°30' N. 69°45' W.

(B) 41°40' N. 69°45' W.

(C) 41°00' N. 69°05' W.

(D) 42°09' N. 67°08'24" W.

(E) 42°30' N. 67°27' W.

(F) 42°30' N. 69°45' W.

(4) Additional Mitigation Measures:

(i) When approaching and departing from the Neptune Port, SRVs shall use the Boston Traffic Separation Scheme (TSS) starting and ending at the entrance to the GSC. Upon entering the TSS, the SRV shall go into a "heightened awareness" mode of operation.

(ii) In the event that a whale is visually observed within 0.6 mi (1 km) of the Port or a confirmed acoustic detection is reported on either of the two auto-detection buoys (ABs) closest to the Port, departing SRVs shall delay their departure from the Port, unless extraordinary circumstances, defined in the Marine Mammal Detection, Monitoring, and Response Plan (the Plan), require that the departure is not delayed. The departure delay shall continue until either the observed whale has been visually (during daylight hours) confirmed as more than 0.6 mi (1 km) from the Port or 30 minutes have passed without another confirmed detection either acoustically within the acoustic detection range of the two ABs closest to the Port or visually within 0.6 mi (1 km) from Neptune.

(iii) SRVs that are approaching or departing from the Port and are within the Area to be Avoided (ATBA) surrounding Neptune shall remain at least 0.6 mi (1 km) away from any visually detected right whales and at least 100 yd (91 m) away from all other visually detected whales unless extraordinary circumstances, as defined in Section 1.2 of the Plan, require that the vessel stay its course. The ATBA is defined in

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33 CFR 150.940. It is the largest area of the Port marked on nautical charts, and it is enforceable by the USCG in accordance with the 33 CFR 150.900 regulations. The Vessel Master shall designate at least one lookout to be exclusively and continuously monitoring for the presence of marine mammals at all times while the SRV is approaching or departing Neptune.

(iv) Neptune shall ensure that other vessels providing support to Port operations during regasification activities that are approaching or departing from the Port and are within the ATBA shall be operated so as to remain at least 0.6 mi (1 km) away from any visually detected right whales and at least 100 yd (91 m) from all other visually detected whales.

(v) PSOs shall direct a moving vessel to slow to idle if a baleen whale is seen less than 0.6 mi (1 km) from the vessel.

(vi) Use of lights during repair or maintenance activities shall be limited to areas where work is actually occurring, and all other lights must be extinguished. Lights must be downshielded to illuminate the deck and shall not intentionally illuminate surrounding waters, so as not to attract whales or their prey to the area.

(vii) Neptune must immediately suspend any repair and maintenance or operations activities if a dead or injured marine mammal is found in the vicinity of the project area, and the death or injury of the animal could be attributable to the Port facility activities. Upon finding a dead or injured marine mammal, Neptune must contact NMFS, the Northeast Stranding and Disentanglement Program, and the USCG. NMFS will review the documentation submitted by the PSO and attempt to attribute a cause of death. Activities shall not resume until review and approval has been given by NMFS.

(5) Additional mitigation measures as contained in a Letter of Authorization issued under §§ 216.106 and 217.177 of this chapter.

(b) [Reserved]

### §217.175 Requirements for monitoring and reporting.

(a) Visual Monitoring Program:

(1) Neptune shall employ PSOs during maintenance- and repair-related activities on each vessel that has a dynamic positioning system. Two (2) PSOs shall be on-duty at all times. All PSOs must receive NMFS-approved PSO training and be approved in advance by NMFS after a review of their qualifications.

(2) Qualifications for these PSOs shall include direct field experience on a marine mammal observation vessel and/or aerial surveys in the Atlantic Ocean/Gulf of Mexico.

(3) The PSOs (one primary and one secondary) are responsible for visually locating marine mammals at the ocean's surface and, to the extent possible, identifying the species. The primary PSO shall act as the identification specialist, and the secondary PSO shall serve as data recorder and also assist with identification. Both PSOs shall have responsibility for monitoring for the presence of marine mammals.

(4) The PSOs shall monitor the maintenance/repair area using the naked eye, hand-held binoculars, and/or power binoculars.

(5) The PSOs shall scan the ocean surface during maintenance- and repair-related activities and record all sightings in marine mammal field sighting logs. Observations of marine mammals shall be identified to the species or the lowest taxonomic level possible, and their relative position in relation to the vessel shall be recorded.

(6) While a SRV is navigating within the designated TSS, three people have lookout duties on or near the bridge of the ship including the SRV Master, the Officer-of-the-Watch, and the Helmsman on watch.

(7) In addition to standard watch procedures, while the SRV is within the ATBA and/or while actively engaging in the use of thrusters, an additional lookout shall be designated to exclusively and continuously monitor for marine mammals. Once the SRV is moored and regasification activities have begun, the vessel is no longer considered in "heightened awareness" status.

(8) At the conclusion of regasification activities, when the SRV is prepared to depart from the Port, the Master shall

once again ensure that the responsibilities as defined in the Plan are carried out. All sightings of marine mammals by the designated lookout, individuals posted to navigational lookout duties, and/or any other crew member while the SRV is within the TSS, in transit to the ATBA, within the ATBA, and/or when actively engaging in the use of thrusters shall be immediately reported to the Officer-of-the-Watch who shall then alert the Master.

(b) Passive Acoustic Monitoring (PAM) Program:

(1) Neptune shall work with NMFS, Stellwagen Bank National Marine Sanctuary (SBNMS), and other scientists to install and monitor an array of passive acoustic detection buoys in the Boston TSS that meets the criteria specified in the recommendations developed by NOAA through consultation with the USCG under the National Marine Sanctuary Act (NMSA). The system shall provide near real-time information on the presence of vocalizing whales in the shipping lanes.

(2) Neptune shall work with NMFS, SBNMS, and other scientists to monitor the archival array of acoustic recording units (ARUs), or “pop-ups,” around the Port that meets the criteria specified in the program developed by NOAA in consultation with the USCG under the NMSA. The ARUs shall remain in place for 5 years following initiation of operations to monitor the actual acoustic output of port operations and alert NOAA to any unanticipated adverse effects of port operations, such as large-scale abandonment of the area or greater acoustic impacts than predicted through modeling.

(3) Passive acoustic devices shall be actively monitored for detections by a NMFS-approved bioacoustic technician.

(4) Repair Activity PAM Measures: PAM, in addition to that required in this section of these regulations, shall be required, on a case-by-case basis, during both planned and emergency repair activities in order to better detect right whales in the area of repair work and to collect additional data on the noise levels produced during repair and maintenance activities.

(i) Neptune shall work with NOAA (NMFS and SBNMS) to evaluate when

to install and maintain an array of real-time passive acoustic detection buoys to provide early warnings for potential occurrence of right whales in the vicinity of the repair area. The number of passive acoustic detection buoys installed around the activity site, if deemed necessary, shall be commensurate with the type and spatial extent of maintenance/repair work required, but must be sufficient to detect vocalizing right whales within the 120-dB impact zone.

(ii) Neptune shall provide NMFS with empirically measured source level data for all sources of noise associated with Port maintenance and repair activities. Measurements shall be carefully planned and coordinated with noise-producing activities and shall be collected from the passive detection network.

(5) SRV Regasification PAM Measures: Source levels associated with dynamic positioning of SRVs at the buoys shall be estimated using empirical measurements collected from a platform positioned as close as practicable to thrusters while in use.

(c) Neptune must implement the following reporting requirements:

(1) Because the Port is within the Mandatory Ship Reporting Area (MSRA), all SRVs transiting to and from the Port must report their activities to the mandatory reporting section of the USCG to remain apprised of North Atlantic right whale movements within the area. All vessels entering and exiting the MSRA must report their activities to WHALESNORTH. Any North Atlantic right whale sightings must be reported to the NMFS Sighting Advisory System.

(2) *Repair work reports.* (i) For major repair work associated with the pipeline lateral or other port components, Neptune shall notify the appropriate NOAA personnel as soon as practicable after it is determined that repair work must be conducted.

(ii) During maintenance and repair of the pipeline lateral or other port components, weekly status reports must be provided to NOAA. The weekly report must include data collected for each distinct marine mammal species observed in the project area during the

period of the repair activity. The weekly reports shall include the following:

(A) The location, time, and nature of the pipeline lateral activities;

(B) Whether the dynamic position (DP) system was operated and, if so, the number of thrusters used and the time and duration of DP operation;

(C) Marine mammals observed in the area (number, species, age group, and initial behavior);

(D) The distance of observed marine mammals from the repair activities;

(E) Observed marine mammal behaviors during the sighting;

(F) Whether any mitigation measures were implemented;

(G) Weather conditions (sea state, wind speed, wind direction, ambient temperature, precipitation, and percent cloud cover, *etc.*);

(H) Condition of the marine mammal observation (visibility and glare); and

(I) Details of passive acoustic detections and any action taken in response to those detections.

(iii) For all minor repair work, Neptune must notify NOAA regarding when and where the repair/maintenance work is to take place along with a tentative schedule and description of the work, as soon as practicable after it is determined that repair work must be conducted. Vessel crews shall record/document any marine mammal sightings during the work period.

(iv) At the conclusion of all minor repair work, Neptune shall provide NOAA with a report describing any marine mammal sightings, the type of work taking place when the sighting occurred, and any avoidance actions taken during the repair/maintenance work.

(3) *Incident reports.* During all phases of project repair/maintenance activities and operation, sightings of any injured or dead marine mammals must be reported immediately to the Chief, Permits, Conservation and Education Division or staff member and the Northeast Stranding and Disentanglement Program, regardless of whether the injury or death is caused by project activities. If the injury or death was caused by a project vessel (*e.g.*, SRV, support vessel, or construction vessel), the USCG must be notified immediately, and a full report

must be provided to NMFS. Activities will not resume until review and approval has been given by NMFS. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the incident;

(ii) The name and type of vessel involved;

(iii) The vessel's speed during the incident;

(iv) Description of the incident;

(v) Water depth;

(vi) Environmental conditions (*e.g.*, wind speed and direction, sea state, cloud cover, and visibility);

(vii) Species identification or description of the animal;

(viii) The fate of the animal; and

(ix) Photographs or video footage of the animal (if equipment is available).

(4) *Annual reports.* (i) An annual report on marine mammal monitoring and mitigation shall be submitted to NMFS, Office of Protected Resources, and NMFS, Northeast Regional Office (specific contact information to be provided in Letter of Authorization), on August 1 of each year. The annual report shall cover the time period of January 1 through December 31 of each year of activity.

(ii) The annual report shall include data collected for each distinct marine mammal species observed in the project area in the Massachusetts Bay during the period of Port operations and repair/maintenance activities. The annual report shall also include a description of marine mammal behavior, overall numbers of individuals observed, frequency of observation, and any behavioral changes and the context of the changes relative to operation and repair/maintenance activities. Additional information that shall be recorded by Neptune or its contractor during operations and repair/maintenance activities and contained in the reports include: results of empirical source level estimation for thrusters while in use and activities associated with maintenance and repair events, date and time of marine mammal detections (visually or acoustically), weather conditions, species identification, approximate distance from the source, activity of the vessel when a marine mammal is sighted, and

whether thrusters were in use and, if so, how many at the time of the sighting.

(5) *Five-year comprehensive report.* (i) Neptune shall submit a draft comprehensive final report to NMFS, Office of Protected Resources, and NMFS, Northeast Regional Office (specific contact information to be provided in Letter of Authorization), 180 days prior to the expiration of the regulations. This comprehensive technical report shall provide full documentation of methods, results, and interpretation of all monitoring during the first four and a half years of the LOA.

(ii) Neptune shall submit a revised final comprehensive technical report, including all monitoring results during the entire period of the LOAs, 90 days after the end of the period of effectiveness of the regulations to NMFS, Office of Protected Resources, and NMFS, Northeast Regional Office (specific contact information to be provided in Letter of Authorization).

#### **§217.176 Applications for Letters of Authorization.**

(a) To incidentally take marine mammals pursuant to these regulations, the U.S. Citizen (as defined by §216.103) conducting the activity identified in §217.170(a) (*i.e.*, Neptune) must apply for and obtain either an initial Letter of Authorization in accordance with §217.177 or a renewal under §217.178.

(b) [Reserved]

#### **§217.177 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, shall be valid for a period of time not to exceed the period of validity of this subpart.

(b) The Letter of Authorization shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (*i.e.*, mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization shall be based on a determination that the total number of

marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

#### **§217.178 Renewal of Letters of Authorization and adaptive management.**

(a) A Letter of Authorization issued under §§216.106 and 217.177 of this chapter for the activity identified in §217.170(a) shall be renewed upon request by the applicant or determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations, provided that:

(1) NMFS is notified that the activity described in the application submitted under §217.176 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) NMFS receives the monitoring reports required under §217.175(c)(1)–(4); and

(3) NMFS determines that the mitigation, monitoring and reporting measures required under §§217.174 and 217.175 and the Letter of Authorization issued under §§216.106 and 217.177 of this chapter were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If either a request for a renewal of a Letter of Authorization issued under §§216.106 and 217.178 or a determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations indicates that a substantial modification, as determined by NMFS, to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed substantive changes to the mitigation and monitoring requirements contained in these regulations



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or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER.

(d) Adaptive Management—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with Neptune regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from Neptune's monitoring from the previous year;

(2) Results from general marine mammal and sound research; or

(3) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

## **§ 217.179 Modifications of Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization issued by NMFS, pursuant to §§ 216.106 and 217.177 of this chapter and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 217.178, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.172(b), a Letter of Authorization issued pursuant to §§ 216.106 and 217.177 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FED-

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ERAL REGISTER within 30 days subsequent to the action.

## **Subparts S–T [Reserved]**

## **Subpart U—Taking Of Marine Mammals Incidental To The Port of Anchorage Marine Terminal Redevelopment Project**

### **§ 217.200 Specified activities and specified geographical region.**

(a) Regulations in this subpart apply only to the incidental taking of those marine mammals specified in § 217.202(b) by the Port of Anchorage and the U.S. Department of Transportation Maritime Administration (MARAD), and those persons it authorizes to engage in construction activities associated with the Port of Anchorage Marine Terminal Redevelopment Project, specifically in-water pile driving, at the Port of Anchorage, Alaska.

(b) [Reserved]

### **§ 217.201 Effective dates.**

Regulations in this subpart are effective from July 15, 2009, through July 14, 2014.

### **§ 217.202 Permissible methods of taking.**

(a) Under Letters of Authorization issued pursuant to § 216.106 of this chapter and § 217.207, the Port of Anchorage and MARAD, and persons under their authority, may incidentally, but not intentionally, take marine mammals by harassment, within the area described in § 217.200, provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The taking of marine mammals under a Letter of Authorization is limited to the incidental take, by Level B harassment only, of the following species under the activities identified in § 217.200(a): Cook Inlet beluga whales (*Delphinapterus leucas*), harbor seals (*Phoca vitulina*), harbor porpoises (*Phocoena phocoena*), and killer whales (*Orcinus orca*).

(c) The taking by injury or death of the species listed in paragraph (b) of

this section or the taking by Level B harassment, injury or death of any other marine mammal species is prohibited and may result in the modification, suspension, or revocation of a Letter of Authorization.

#### § 217.203 Prohibitions.

Notwithstanding takings contemplated in § 217.202(b) and authorized by a Letter of Authorization issued under § 216.106 of this chapter and § 217.207, no person in connection with the activities described in § 217.200 may:

(a) Take any marine mammal not specified in § 217.202(b);

(b) Take any marine mammal specified in § 217.202(b) other than by incidental, unintentional Level B harassment;

(c) Take a marine mammal specified in § 217.202(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under § 216.106 of this chapter and § 217.207.

#### § 217.204 Mitigation.

(a) When conducting operations identified in § 217.200(a), the mitigation measures contained in the Letter of Authorization, issued under § 216.106 of this chapter and § 217.207, must be implemented. These mitigation measures are:

(1) Through monitoring described under § 217.205, the Holder of a Letter of Authorization will ensure that no marine mammal is subjected to a sound pressure levels of 190 or 180 dB re: 1 microPa or greater for pinnipeds and cetaceans, respectively. If a marine mammal is detected within or approaching a distance 200 m from in-water pile driving or in-water chipping, operations shall be immediately delayed or suspended until the marine mammal moves outside these designated zones or the animal is not detected within 15 minutes of the last sighting.

(2) If a marine mammal is detected within or approaching the Level B harassment zone designated for impact pile driving (350 m) prior to in-water

impact pile driving, operations shall not commence until the animal moves outside this zone or it is not detected within 15 minutes of the last sighting.

(3) If a marine mammal is detected within or approaching the Level B harassment zone designated for vibratory pile driving (1,300 m) prior to in-water vibratory pile driving, operations shall not commence until the marine mammal moves outside this zone or it is not detected within 15 minutes of the last sighting.

(4) A start'' technique shall be used at the beginning of each day's in-water pile driving activities or if pile driving has ceased for more than one hour to allow any marine mammal that may be in the immediate area to leave before piling driving reaches full energy. For vibratory hammers, the soft start requires the holder of the Letter of Authorization to initiate noise from the hammers for 15 seconds at reduced energy followed by 1-minute waiting period and repeat the procedure two additional times. If an impact hammer is used, the soft start requires an initial set of three strikes from the impact hammer at 40 percent energy, followed by a one minute waiting period, then two subsequent 3 strike sets.

(5) In-water pile driving or chipping shall not occur when conditions restrict clear, visible detection of all waters within the appropriate harassment zones or the 200 m safety zone. Such conditions that can impair sightability include, but are not limited to, fog and rough sea state.

(6) In-water piles will be driven with a vibratory hammer to the maximum extent possible (i.e., until a desired depth is achieved or to refusal) prior to using an impact hammer.

(7) In-water impact pile driving shall not occur during the period from two hours before low tide until two hours after low tide.

(8) The following measures apply to all in-water pile driving, except during the ''stabbing'' phase, and all in-water chipping associated with demolition of the existing dock:

(i) No in-water pile driving (impact or vibratory) or chipping shall occur if any marine mammal is located within 200m of the hammer in any direction. If any marine mammal is sighted within

or approaching this 200m safety zone, pile-driving or chipping must be suspended until the animal has moved outside the 200m safety zone or the animal is not resighted within 15 minutes.

(ii) If a group of more than 5 beluga whales is sighted within the Level B harassment isopleths, in-water pile driving shall be suspended. If the group is not re-sighted within 15 minutes, pile driving may resume.

(iii) If a beluga whale calf or group with a calf is sighted within or approaching a harassment zone, in-water pile driving shall cease and shall not be resumed until the calf or group is confirmed to be outside of the harassment zone and moving along a trajectory away from such zone. If the calf or group with a calf is not re-sighted within 15 minutes, pile driving may resume.

(9) If maximum authorized take is reached or exceeded for a particular species, any marine mammal of that species entering into the harassment or safety isopleths will trigger mandatory in-water pile driving shut down.

(10) For Port of Anchorage operated in-water heavy machinery work other than pile driving or chipping (i.e., dredging, dump scowles, tug boats used to move barges, barge mounted hydraulic excavators, or clamshell equipment used to place or remove material), if a marine mammal comes within 50 m, those operations will cease and vessels will reduce to the slowest speed practicable while still maintaining control of the vessel and safe working conditions.

(11) In the event the Port of Anchorage conducts out-of-water blasting, detonation of charges will be delayed if a marine mammal is detected anywhere within a visible distance from the detonation site.

(12) Additional mitigation measures as contained in a Letter of Authorization.

(b) [Reserved]

**§ 217.205 Requirements for monitoring and reporting.**

(a) The Holder of a Letter of Authorization issued pursuant to § 216.106 of this chapter and § 217.207, for activities described in § 217.200(a) is required to cooperate with NMFS, and any other

Federal, state or local agency with authority to monitor the impacts of the activity on marine mammals. Unless specified otherwise in the Letter of Authorization, the Holder of the Letter of Authorization must notify the Administrator, Alaska Region, NMFS, by letter, e-mail, or telephone, at least 2 weeks prior to commencement of seasonal activities and dock demolition possibly involving the taking of marine mammals. If the activity identified in § 217.200(a) is thought to have resulted in the mortality or injury of any marine mammals or in any take of marine mammals not identified in § 217.202(b), the Holder of the Letter of Authorization must notify the Director, Office of Protected Resources, NMFS, or designee, by e-mail or telephone (301-713-2289), within 24 hours of the discovery of the injured or dead animal.

(b) The Holder of a Letters of Authorization must designate qualified, on-site marine mammal observers (MMOs), approved in advance by NMFS, as specified in the Letter of Authorization, to:

(1) Conduct visual marine mammal monitoring at the Port of Anchorage beginning 30 minutes prior to and during all in-water pile driving or chipping and out-of-water blasting.

(2) Record the following information on NMFS-approved marine mammal sighting sheets whenever a marine mammal is detected:

(i) Date and time of initial sighting to end of sighting, tidal stage, and weather conditions (including Beaufort Sea State);

(ii) Species, number, group composition, initial and closest distance to pile driving hammer, and behavior (e.g., activity, group cohesiveness, direction and speed of travel, etc.) of animals throughout duration of sighting;

(iii) Any discrete behavioral reactions to in-water work;

(iv) The number (by species) of marine mammals that have been taken;

(v) Pile driving, chipping, or out of water blasting activities occurring at the time of sighting and if and why shut down was or was not implemented.

(3) Employ a scientific marine mammal monitoring team separate from the on-site MMOs to characterize

beluga whale abundance, movements, behavior, and habitat use around the Port of Anchorage and observe, analyze, and document potential changes in behavior in response to in-water construction work. This monitoring team is not required to be present during all in-water pile driving operations but will continue monitoring one-year post in-water construction. The on-site MMOs and this marine mammal monitoring team shall remain in contact to alert each other to marine mammal presence when both teams are working.

(c) The Holder of a Letter of Authorization must conduct additional monitoring as required under an annual Letter of Authorization.

(d) The Holder of a Letter of Authorization shall submit a monthly report to NMFS' Headquarters Permits, Education and Conservation Division and the Alaska Region, Anchorage for all months in-water pile driving or chipping takes place. This report must contain the information listed in paragraph (b)(2) of this section.

(e) An annual report must be submitted at the time of application for renewal of a Letter of Authorization. This report will summarize all in-water construction activities and marine mammal monitoring from January 1-December 31, annually, and any discernable short or long term impacts from the Marine Terminal Expansion Project.

(f) A final report must be submitted to NMFS upon application for a subsequent incidental take authorization or, if no future authorization is requested, no later than 90 days post expiration of these regulations. This report will:

(1) Summarize the activities undertaken and the results reported in all previous reports;

(2) Assess the impacts to marine mammals from the port expansion project; and

(3) Assess the cumulative impacts on marine mammals.

#### **§217.206 Applications for Letters of Authorization.**

(a) To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by §216.103 of this chapter) conducting the activity identified in §217.200(a) (the

Port of Anchorage and MARAD) must apply for and obtain either an initial Letter of Authorization in accordance with §217.207 or a renewal under §217.208.

(b) The application must be submitted to NMFS at least 60 days before the expiration of the initial or current Letter of Authorization.

(c) Applications for a Letter of Authorization and for renewals of Letters of Authorization must include the following:

(1) Name of the U.S. citizen requesting the authorization,

(2) The date(s), duration, and the specified geographic region where the activities specified in §217.200 will occur; and

(3) The most current population estimate of Cook Inlet beluga whales and the estimated percentage of marine mammal populations potentially affected for the 12-month period of effectiveness of the Letter of Authorization;

(4) A summary of take levels, monitoring efforts and findings at the Port of Anchorage to date.

(d) The National Marine Fisheries Service will review an application for a Letter of Authorization in accordance with this section and, if adequate and complete, issue a Letter of Authorization.

#### **§217.207 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart, but must be renewed annually subject to annual renewal conditions in §217.208.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking; and

(2) Requirements for mitigation, monitoring and reporting, including, but not limited to, means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses.

(c) Issuance of a Letter of Authorization will be based on the determination that the number of marine mammals taken during the period the Letter of Authorization is valid will be small,

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that the total taking of marine mammals by the activities specified in § 217.200(a) will have no more than a negligible impact on the species or stock of affected marine mammal(s), and that the total taking will not have an unmitigable adverse impact on the availability of species or stocks of marine mammals for subsistence uses.

(d) Notice of issuance or denial of an application for a Letter of Authorization will be published in the FEDERAL REGISTER within 30 days of a determination.

### § 217.208 Renewal of Letters of Authorization.

(a) A Letter of Authorization issued under § 216.106 of this chapter and § 217.207 for the activity identified in § 217.200(a) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 217.206 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Timely receipt of the monitoring reports required under § 217.205(d) and (e), and the Letter of Authorization issued under § 217.207, which has been reviewed and accepted by NMFS; and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under §§ 217.204 and 217.205 and the Letter of Authorization issued under § 216.106 of this chapter and § 217.207, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization; and

(4) A determination by NMFS that the number of marine mammals taken during the period of the Letter of Authorization will be small, that the total taking of marine mammals by the activities specified in § 217.200(a) will have no more than a negligible impact on the species or stock of affected marine mammal(s), and that the total taking will not have an unmitigable adverse impact on the availability of species or stocks of marine mammals for subsistence uses.

(b) If a request for a renewal of a Letter of Authorization issued under § 216.106 of this chapter and this section

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indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request.

(c) Notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER within 30 days of a determination.

### § 217.209 Modifications of Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to § 216.106 of this chapter and § 217.207 and subject to the provisions of this subpart, shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 217.208, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.202(b), a Letter of Authorization issued pursuant to § 216.106 of this chapter and § 217.207 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days subsequent to the action.

## Subpart W—Taking of Marine Mammals Incidental to the Elliott Bay Seawall Project

SOURCE: 78 FR 63402, Oct. 24, 2013, unless otherwise noted.

EFFECTIVE DATE NOTE: At 78 FR 63402, Oct. 24, 2013, subpart W was added, effective Oct. 21, 2013, to Oct. 21, 2018.

### § 217.220 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the Elliott Bay Seawall project

and those persons it authorizes to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section incidental to seawall construction associated with the Elliott Bay Seawall project.

(b) The taking of marine mammals by the City of Seattle's Department of Transportation (SDOT) may be authorized in a Letter of Authorization (LOA) only if it occurs in Elliott Bay, Washington.

#### § 217.221 Effective dates.

This subpart is effective October 21, 2013, through October 21, 2018.

#### § 217.222 Permissible methods of taking.

(a) Under LOAs issued pursuant to §§ 216.106 and 217.226 of this chapter, the Holder of the LOA (hereinafter "SDOT" and "City") may incidentally, but not intentionally, take marine mammals within the area described in § 217.220(b), provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

(b) The incidental take of marine mammals under the activities identified in § 217.220(a) is limited to the indicated number of Level B harassment takes of the following species/stocks:

(1) Harbor seal (*Phoca vitulina*)—3,500 (an average of 700 animals per year)

(2) California sea lion (*Zalophus californianus*)—875 (an average of 175 animals per year)

(3) Steller sea lion (*Eumetopias jubatus*)—875 (an average of 175 animals per year)

(4) Harbor porpoise (*Phocoena phocoena*)—1,575 (an average of 315 animals per year)

(5) Dall's porpoise (*Phocoenoides dalli*)—350 (an average of 70 animals per year)

(6) Killer whale (*Orcinus orca*), Eastern North Pacific Southern resident—80 (a maximum of 16 animals per year)

(7) Killer whale (*Orcinus orca*), Eastern North Pacific transient—120 (an average of 24 animals per year)

(8) Gray whale (*Eschrichtius robustus*)—40 (an average of 8 animals per year)

(9) Humpback whale (*Megaptera novaeangliae*)—20 (an average of 4 animals per year)

#### § 217.223 Prohibitions.

Notwithstanding takings contemplated in § 217.222(b) and authorized by an LOA issued under § 216.106 and § 217.226 of this chapter, no person in connection with the activities described in § 217.220 may:

(a) Take any marine mammal not specified in § 217.222(b);

(b) Take any marine mammal specified in § 217.222(b) other than by incidental, unintentional Level B harassment;

(c) Take a marine mammal specified in § 217.222(b) if NMFS determines such taking results in more than a negligible impact on the species or stock of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 216.106 and 217.226 of this chapter.

#### § 217.224 Mitigation.

(a) When conducting the activities identified in § 217.220(a), the mitigation measures contained in the LOA issued under §§ 216.106 and 217.226 of this chapter must be implemented. These mitigation measures include:

(1) *Limited Impact Pile Driving.* (i) All sheet piles shall be installed using a vibratory driver, unless impact driving is required to install piles that encounter consolidated sediments or for proofing load bearing sections.

(ii) Any impact driver used in conjunction with vibratory pile driving shall employ sound attenuation devices, where applicable.

(iii) Any attenuation devices that become available for vibratory pile driving shall be considered for additional mitigation.

(2) *Containment of Impact Pile Driving.* The majority of permanent concrete piles shall be driven behind the temporary containment wall.

(3) *Additional Attenuation Measures.* In the event that underwater sound monitoring shows that noise generation from pile installation exceeds the levels originally expected, SDOT shall immediately notify NMFS so it can

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evaluate the need for implementation of additional attenuation devices or other mitigation measures.

(4) *Ramp-up.* (i) Ramp-up shall be used at the beginning of each day's in-water pile-related activities or if pile driving has ceased for more than 1 hour.

(ii) If a vibratory hammer is used, contractors shall initiate sound from vibratory hammers for 15 seconds at reduced energy followed by a 1-minute waiting period. This procedure shall be repeated two additional times before full energy may be achieved.

(iii) If a non-diesel impact hammer is used, contractors shall provide an initial set of strikes from the impact hammer at reduced energy, followed by a 1-minute waiting period, then two subsequent sets.

(iv) Ramp-up shall be implemented if pile driving or removal is delayed or shutdown for >15 minutes due to the presence of a delphinid or pinniped within or approaching the exclusion zone, or if pile driving or removal is delayed or shutdown for >30 minutes due to the presence of a large whale.

(5) *Marine Mammal Exclusion Zones.* (i) The following exclusion zones shall be established to prevent the Level A harassment of all marine mammals and to reduce the Level B harassment of large whales:

(A) An exclusion zone for delphinids or pinnipeds shall be established with a radius of 200 feet (61 meters) waterward of each steel sheet pile during impact pile driving;

(B) An exclusion zone for delphinids and pinnipeds shall be established with a radius of 50 feet (15 meters) waterward of each concrete pile during impact pile driving;

(C) An exclusion zone for large whales shall be established with a radius of 3,280 feet (1,000 meters) waterward of each steel sheet or concrete pile during impact pile driving;

(D) An exclusion zone for large whales shall be established with a radius of 2.5 miles (3,981 meters) waterward of each steel sheet pile during vibratory pile driving.

(ii) Temporary buoys shall be used, as feasible, to mark the distance to each exclusion zone during in-water pile-related activities.

(iii) The exclusion zones shall be used to provide a physical threshold for the shutdown of in-water pile-related activities.

(iv) At the start of in-water pile related activities each day, a minimum of one qualified protected species observer shall be staged on land (or an adjacent pier) near the location of in-water pile-related activities to document and report any marine mammal that approaches or enters a relevant exclusion zone throughout the day.

(v) Additional land-based observers shall be deployed if needed to ensure the construction area is adequately monitored.

(vi) Observers shall monitor for the presence of marine mammals 30 minutes before, during, and for 30 minutes after any in-water pile-related activities.

(vii) In-water pile-related activities shall not occur if any part of the exclusion zones are obscured by fog or poor lighting conditions.

(6) *Shutdown and Delay Procedures.* (i) If a marine mammal is seen approaching or entering a relevant exclusion zone (as specified in § 217.224(5)(i)), observers will immediately notify the construction personnel operating the pile-related equipment to shut down pile-related activities.

(ii) If a marine mammal(s) is present within the applicable exclusion zone prior to in-water pile-related activities, pile driving/removal shall be delayed until the animal(s) has left the exclusion zone or until 15 minutes (pinniped or small cetacean) or 30 minutes (large cetacean) have elapsed without observing the animal.

(7) Additional mitigation measures as contained in an LOA issued under §§ 216.106 and 217.226 of this chapter.

### § 217.225 Requirements for monitoring and reporting.

(a) When conducting the activities identified in § 217.220(a), the monitoring and reporting measures contained in the LOA issued under §§ 216.106 and 217.226 of this chapter must be implemented. These measures include:

(1) *Visual Monitoring.* (i) In addition to the mitigation monitoring described in § 217.224 of this chapter, at least two

protected species observers shall be positioned on land near the 2.5 mile exclusion zone to monitor for marine mammals during vibratory pile-related activities or any other construction activities that may pose a threat to marine mammals.

(A) Observers shall use the naked eye, wide-angle binoculars with reticles, and any other necessary equipment to scan the Level B harassment isopleth.

(B) Observers shall work, on average, eight hours per day and shall be relieved by a fresh observer if pile driving lasts longer than usual (*i.e.*, 12–16 hours).

(C) The number of observers shall be increased and/or positions changed to ensure full visibility of the Level B harassment isopleth.

(D) Land-based visual monitoring shall be conducted during all days of vibratory pile driving.

(E) All land-based monitoring shall begin at least 30 minutes prior to the start of in-water pile-related activities, and continue during active construction and for 30 minutes following the end of in-water pile-related activities.

(ii) At a minimum, observers shall record the following information:

(A) Date of observation period, monitoring type (land-based/boat-based), observer name and location, climate and weather conditions, and tidal conditions;

(B) Environmental conditions that could confound marine mammal detections and when/where they occurred;

(C) For each marine mammal sighting, the time of initial sighting and duration to the end of the sighting period;

(D) Observed species, number, group composition, distance to pile-related activities, and behavior of animals throughout the sighting;

(E) Discrete behavioral reactions, if apparent;

(F) Initial and final sighting locations marked on a grid map; and

(G) Pile-related activities taking place during each sighting and if/why a shutdown was or was not triggered.

(2) *Acoustic Monitoring.* (i) Acoustic monitoring shall be conducted during in-water pile-related activities to identify or confirm noise levels for pile-re-

lated activities during in-water construction.

(A) Acoustic data shall be collected using hydrophones connected to a drifting boat to reduce the effect of flow noise and an airborne microphone. There shall be a direct line of acoustic transmission through the water column between the pile and the hydrophones in all cases, without any interposing structures, including other piles.

(B) A stationary two-channel hydrophone recording system shall be deployed to record a representative sample (subset of piles) during the monitoring period. Acoustic data shall be collected 1 m below the water surface and 1 m above the sea floor.

(ii) Background noise recordings (in the absence of pile driving) shall be collected to provide a baseline background noise profile. The results and conclusions of the study shall be summarized and presented to NMFS with recommendations for any modifications to the monitoring plan or exclusion zones.

(iii) All sensors, signal conditioning equipment, and sampling equipment shall be calibrated at the start of the monitoring period and rechecked at the start of each day.

(iv) Prior to monitoring, water depth measurements shall be taken to ensure that hydrophones do not drag on the bottom during tidal changes.

(v) Underwater and airborne acoustic monitoring shall occur for the first five steel sheet pile and the first five concrete piles during the duration of pile driving. If a representative sample has not been achieved after the five piles have been monitored (*e.g.*, if there is high variability of sound levels between pilings), acoustic monitoring shall continue until a representative acoustic sample has been collected.

(vi) Acoustic data shall be downloaded periodically (*i.e.*, daily or on another appropriate schedule) and analyzed following the first year of construction. Post-analysis of underwater sound level signals shall include the following:

(A) RMS values (average, standard deviation/error, minimum, and maximum) for each recorded pile. The 10-second RMS averaged values will be



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used for determining the source value and extent of the 120 dB underwater isopleth;

(B) Frequency spectra for each functional hearing group; and

(C) Standardized underwater source levels to a reference distance of 10 m (33 ft).

(vii) Post-analysis of airborne noise would be presented in an unweighted format and include:

(A) The unweighted RMS values (average, minimum, and maximum) for each recorded pile. The average values would be used for determining the extent of the airborne isopleths relative to species-specific criteria;

(B) Frequency spectra from 10 Hz to 20 kHz for representative pile-related activity; and

(C) Standardized airborne source levels to a reference distance of approximately 15 m (50 ft).

(viii) In the event noise levels surpass estimated levels for extended periods of time, construction shall be stopped and NMFS shall be contacted to discuss the cause and potential solutions.

(3) *General Reporting.* (i) All marine mammal sightings shall be documented by observers on a NMFS-approved sighting form.

(ii) Marine mammal reporting shall include all data described previously under Proposed Monitoring, including observation dates, times, and conditions, and any correlations of observed marine mammal behavior with activity type and received levels of sound, to the extent possible.

(iii) A report with the results of all acoustic monitoring shall include the following:

(A) Size and type of piles;

(B) A detailed description of any sound attenuation device used, including design specifications;

(C) The impact hammer energy rating used to drive the piles, make and model of the hammer(s), and description of the vibratory hammer;

(D) A description of the sound monitoring equipment;

(E) The distance between hydrophones and depth of water and the hydrophone locations;

(F) The depth of the hydrophones;

(G) The distance from the pile to the water's edge;

(H) The depth of water in which the pile was driven;

(I) The depth into the substrate that the pile was driven;

(J) The physical characteristics of the bottom substrate into which the pile were driven;

(K) The total number of strikes to drive each pile;

(L) The results of the hydroacoustic monitoring, including the frequency spectrum, ranges and means for the peak and RMS sound pressure levels, and an estimation of the distance at which RMS values reach the relevant marine mammal thresholds and background sound levels.

(M) Vibratory driving results would include the maximum and overall average RMS calculated from 30-s RMS values during the drive of the pile; and

(N) A description of any observable marine mammal behavior in the immediate area and, if possible, correlation to underwater sound levels occurring at that time.

(iv) An annual report on monitoring and mitigation shall be submitted to NMFS, Office of Protected Resources, and NMFS, Northwest Regional Office. The annual reports shall summarize include data collected for each marine mammal species observed in the project area, including descriptions of marine mammal behavior, overall numbers of individuals observed, frequency of observation, any behavioral changes and the context of the changes relative to activities would also be included in the annual reports, date and time of marine mammal detections, weather conditions, species identification, approximate distance from the source, and activity at the construction site when a marine mammal is sighted.

(v) A draft comprehensive report on monitoring and mitigation shall be submitted to NMFS, Office of Protected Resources, and NMFS, Northwest Regional Office, 180 days prior to the expiration of the regulations. The comprehensive technical report shall provide full documentation of methods, results, and interpretation of all monitoring during the first 4.5 years of the regulations. A revised final comprehensive technical report, including all monitoring results during the entire

period of the regulations, shall be due 90 days after the end of the period of effectiveness of the regulations.

(4) *Reporting Injured or Dead Marine Mammals.* (i) In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by an LOA (if issued), such as an injury (Level A harassment), serious injury, or mortality, the Holder shall immediately cease the specified activities and report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Northwest Regional Stranding Coordinator. The report must include the following information:

- (A) Time and date of the incident;
- (B) Description of the incident;
- (C) Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- (D) Description of all marine mammal observations in the 24 hours preceding the incident;
- (E) Species identification or description of the animal(s) involved;
- (F) Fate of the animal(s); and
- (G) Photographs or video footage of the animal(s).

(ii) Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with the Holder to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The Holder may not resume their activities until notified by NMFS.

(iii) In the event that the Holder discovers an injured or dead marine mammal, and the lead protected species observer determines that the cause of the injury or death is unknown and the death is relatively recent (e.g., in less than a moderate state of decomposition), the Holder shall immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Northwest Regional Stranding Coordinator. The report must include the same information identified in §217.225(a)(3) of this chapter. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with the Holder to determine

whether additional mitigation measures or modifications to the activities are appropriate.

(iv) In the event that the Holder discovers an injured or dead marine mammal, and the lead protected species observer determines that the injury or death is not associated with or related to the activities authorized in the LOA (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the Holder shall report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Northwest Regional Stranding Coordinator, within 24 hours of the discovery. The Holder shall provide photographs or video footage or other documentation of the stranding animal sighting to NMFS.

#### §217.226 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the applicant must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Holder must apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the Holder must apply for and obtain a modification of the LOA as described in §217.227.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.*, mitigation) on the species and its habitat; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the FEDERAL REGISTER within 30 days of a determination.

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### § 217.227 Renewals and Modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 and 217.226 of this chapter for the activity identified in § 217.220(a) of this chapter shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in § 217.227(c)(1)), and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in § 217.227(c)(1)) that do not change the findings made for the regulations or that result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis illustrating the change, and solicit public comments before issuing the LOA.

(c) An LOA issued under §§ 216.106 and 217.226 of this chapter for the activity identified in § 217.220(a) may be modified by NMFS under the following circumstances:

(1) Adaptive Management—NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with the Holder regarding the practicality of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or report-

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ing measures in an LOA include the following:

(A) Results from the Holder's monitoring from the previous year(s);

(B) Results from other marine mammal and/or sound research or studies;

(C) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comments.

(2) Emergencies—If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.222(b), an LOA may be modified without prior notice or opportunity for public comment. Notice of such action will be published in the FEDERAL REGISTER within 30 days of the action.

[74 FR 35143, July 20, 2009, as amended at 76 FR 16318, Mar. 23, 2011; 76 FR 34172, June 13, 2011; 77 FR 31544, May 29, 2012; 78 FR 20816, Apr. 8, 2013; 78 FR 63402, Oct. 24, 2013; 78 FR 75507, Dec. 12, 2013; 79 FR 10026, Feb. 24, 2014; 79 FR 32684, June 6, 2014]

## PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

### Subparts A–G [Reserved]

### Subpart H—Taking and Importing Marine Mammals; U.S. Navy's Hawaii-Southern California Training and Testing (HSTT)

218.70 Specified activity and specified geographical region.

218.71 Effective dates and definitions.

218.72 Permissible methods of taking.

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218.77 Letters of Authorization.